UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/471
11 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 471

Case No. 501: BYFIELD

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 21 November 1988, Keith Henderson Byfield, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 10 February 1989, the Applicant after making the necessary corrections, again filed an application, the pleas of which read in part as follows:

"PLEAS

1) ...

2) ... the Appellant is requesting the Tribunal to order Respondent to pay monetary compensation as retroactive (back-pay) from June 1, 1985 to the date of settlement, of Appellant's salary, health insurance pension, life insurance, dental insurance, uniforms, education grants, family visit travels vacation and all other benefits due to the Appellant and Appellant's family.

3) ... The Appellant is requesting the Tribunal to order the Respondent to pay monetary compensation to Appellant for its medical negligence, and suffering he caused on Appellant.

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4) ... Appellant is therefore requesting the Tribunal to award Appellant monetary compensation Re: The Violation of his rights to due process of the law in UN appeal procedures.

5) ... The Appellant is requesting the Tribunal to order Respondent to pay monetary compensation to the Appellant for the mental anguish he has caused on the Appellant.

6) ... The Appellant is therefore requesting the Tribunal to order Respondent to pay monetary compensation for disruption in Appellant's matrimonial home, separation of his wife is caused by his, Respondent's actions.

7) ... Appellant therefore requests the Tribunal to award monetary compensation to Appellant for knowingly defaming Appellant's character.

8) ... The Appellant is therefore requesting the Tribunal to order Respondent to pay monetary compensation to Appellant for his loss in job opportunities, and employment.

9) ... The Appellant therefore requests the Tribunal to order the Respondent to pay monetary compensation for the material, physical, and mental anguish that Respondent has caused on his, Appellant's family.

10) ... Appellant is therefore requesting the Tribunal to order Respondent to pay monetary compensation to Appellant for the aggravation 'that includes a loss of confidence with exposure to ridicule'.

11) ... The Appellant requests the Tribunal to order the Respondent to pay monetary compensation of twenty million dollars in respect to material-mental and physical damage to Appellant and Appellant's family on the above subject matters of:

12) A. Medical Malpractice (Negligence).
B. Rights violated to due process of the law in UN appeal procedures with procedural errors.
C. Mental Anguish.
D. Disruption in Appellant's matrimonial home.
E. Defamation of Appellant's character.
F. Material and Physical damage to Appellant's employment and job opportunities.
G. Material, Physical and Mental anguish on Appellant's wife and family.
H. Aggravation that includes 'a' loss of confidence with exposure to ridicule.
I. Discrimination."

Whereas the Respondent filed his answer on 4 April 1989;

Whereas the Applicant filed written observations on 15 May 1989;

Whereas, on 22 March 1990, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 3 August and 15 October 1989, and on 18 and 29 March 1990, the Applicant submitted additional statements;

Whereas, on 23 April 1990, the Applicant submitted a statement from his wife;

Whereas the facts in the case are as follows:

Keith Byfield was recruited by the United Nations on 1 May 1982, as a Field Service Security Officer at the FS-2, Step I level. He was initially offered a one year fixed-term appointment and was assigned to the United Nations Truce Supervision Organization for Palestine (UNTSO), in Jerusalem. He served on a succession of fixed-term appointments until 30 September 1984, when his appointment was extended for three months, pending routine medical clearance, pursuant to Staff Regulation 4.6.

In May 1984, the Applicant was examined by Dr. Avramov, the local U.N. physician in Israel, who concluded that the Applicant suffered from mitral stenosis, a cardiac problem. He therefore referred him to a cardiologist, Dr. Bishara, who after examining the Applicant on 8 May 1984, concluded, contrary to Dr. Avramov, that the Applicant's health was normal.

The Applicant was subsequently examined twice, in July and on 30 November 1984, by Dr. Avramov, who notwithstanding Dr. Bishara's report, reiterated his initial diagnosis, that the Applicant suffered from mitral stenosis. Dr. Avramov transmitted his medical assessment of the Applicant to Dr. Irwin, the U.N. Medical Director at Headquarters, apparently without forwarding and without mentioning Dr. Bishara's evaluation of the Applicant's health.

In December 1984, the Applicant, who was on family visit travel to Jamaica and the United States, was examined by his family physician, Dr. Pahwroo, as well as by Dr. Erenrich, a physician in the United States. Both doctors concluded that the Applicant was in perfect health.

On 3 January 1985, the U.N. Medical Director informed the Administration of his conclusion that the Applicant was "not medically fit

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for an extension of his present contract". On his return to Israel from Jamaica, the Applicant, who had been advised of the U.N. Medical Director's conclusion, was examined at Headquarters on 23 January 1985, by the U.N. Medical Director himself and by the U.N. consultant cardiologist, who confirmed that "clinically ... [the Applicant] had mitral stenosis". On this basis the U.N. Medical Director classified the Applicant, in accordance with Personnel Directive PD/2/80/Rev.1, as 2A i.e. only eligible for employment after a "correctible medical impairment" were corrected or not eligible yet for employment on account of a "serious medical problem". He reiterated his conclusion that the Applicant could not be medically cleared for an extension of his fixed-term appointment.

The Applicant returned to Jerusalem and was examined once again on 31 January 1985, by Dr. Avramov, who referred him to a specialist in cardiology, Professor Stern. In a report dated 3 January 1985(sic), Professor Stern stated that after performing an echocardiogram, a specialized test, he had verified that the Applicant's heart valves were normal and that he "should not be limited at all in his physical activities". Dr. Avramov subsequently wrote a medical certificate dated 20 February 1985, in which he concluded, in accordance with Professor Stern, that the Applicant was in good health.

The Applicant's appointment was however extended for two successive fixed-term periods of two months and three months until 31 May 1985, in order to enable him to arrange his personal affairs and his repatriation travel.

Prior to his separation from service, on 6 March 1985, the Applicant requested the Secretary-General to review the decision not to renew his fixed-term appointment, arguing essentially that the failure to clear him for further employment resulted from a medical error. His letter was treated as a request for administrative review pursuant to Staff Rule 111.2(a). Not having received a reply from the Secretary-General within the time-limits prescribed in the Staff Rules, on 14 June 1985, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The Applicant's statement of appeal was forwarded to the U.N. Medical Director for comments. In a memorandum dated 1 August 1985, the U.N. Medical Director informed the Director, Office for Field Operational and

External Support Activities (OFOESA), that having reviewed the Applicant's statement of appeal and new medical information attached to the appeal, he was obliged to reverse his decision concerning the Applicant's medical classification. Among the various documents forwarded with the appeal, was the report dated 3 January 1985(sic), from Professor Stern to Dr. Avramov, in which Professor Stern stated "that while clinically, there [were] indications of a heart valve problem, a specialized test known as an echocardiogram was made on 1 February 1985, and this shows that the heart valves are normal". The U.N. Medical Director concluded that "if [he] had seen Professor Stern's 3 February report earlier, then the whole course of events regarding Mr. Byfield would have been different ...". Accordingly, he was "prepared to medically reclassify [the Applicant] to 1A", i.e. "fit for general employment". He stated his hope that the Applicant could "be re-instated as a Field Service Officer as soon as possible", and that "some way could be found to reimburse [the Applicant] for any financial burdens he has borne in leaving U.N. service and in being re-instated".

In a cable dated 9 August 1985, the Director, OFOESA, informed the Applicant of the U.N. Medical Director's recommendation and of the terms of an offer by the Administration to reinstate him, effective 1 June 1985, subject to the withdrawal of his appeal and to his returning to the Organization all monies received in connection with his separation from service, including his repatriation grant and the lump sum corresponding to commutation of the balance of his annual leave. The period running from 1 June 1985 until the date before he would resume his functions would be treated as special leave with pay.

An exchange of correspondence ensued between the Applicant and the Administration concerning the offer of reinstatement and its modalities. The Applicant argued that he should not be obliged to repay his repatriation grant and the sum corresponding to his annual leave commutation since his appointment had been terminated by the Administration's fault.

In the meantime, OFOESA, the U.N. Traffic Unit and the Internal Audit Division (IAD) were jointly investigating the Applicant's claim for destination charges and other expenses relating to the shipment of personal effects after his separation from the service of the U.N.

In a cable dated 26 September 1985, the Director, OFOESA, informed the Applicant that all the issues he had raised in correspondence related to the offer of settlement concerning his separation and reinstatement were being reviewed and that his travel should consequently be held in abeyance pending further instructions from the U.N. In a letter dated 23 October 1985, the Applicant complained about the delays by the U.N. concerning the conditions of his re-employment, delays which had an effect on his search for employment and which resulted in financial and mental depression for his family. He therefore requested full compensation and damages. On 30 October 1985, the Applicant's wife wrote to OFOESA, threatening legal action against the Organization.

The investigation conducted by IAD during the next several months was concluded in February 1986. In a report dated 12 February 1986, the Director, IAD, informed the Director, Division of Personnel Administration, of his conclusions. On 5 March 1986, the Applicant was asked to comment on the report. On 10 March 1986, the Applicant wrote to the Personnel Officer, setting forth his views on the report, but on 17 April 1986, the Director, IAD, concluded that the Applicant had not been able to clear discrepancies in the investigation. Accordingly, on 23 April 1986, the Personnel Officer informed the Applicant that since the explanations provided by him in respect of his shipment claim were not found fully satisfactory, the U.N. was no longer considering his re-employment.

On 27 April 1987, the Applicant asked for submission of his appeal directly to the Tribunal but on 19 May 1987, the Assistant Secretary-General for Human Resources and Management rejected his request. The Board adopted its report on 6 September 1988. Its findings and recommendations read as follows:

"Findings and Recommendations

82. The Panel unanimously,

(a) Finds that while a regrettable error was committed in the medical classification of the appellant, his medical record was properly corrected;

(b) Finds that the Secretary-General attempted in good faith to correct this error by offering to continue the appellant in his employment and that he was within his right when he withdrew the offer since the appellant had not accepted the offer;

(c) Finds that the erroneous medical classification of the appellant could not be considered as resulting from medical malpractice;

(d) Finds that the appellant has produced no evidence that his separation from service was discriminatory;

(e) Finds that the Secretary-General had no obligation, under Staff Rule 111.2(a) to enter into negotiations with the appellant to settle the appeal.

83. The Panel unanimously considers that the finding in paragraph 82(a) above is sufficient to grant the appellant the redress he requested in respect to his erroneous medical classification.

84. The Panel unanimously concluded that in submitting an unsubstantiated claim for reimbursement of the cost of his shipment the appellant had not met the high standard of integrity expected of a staff member, as provided for in the Charter.

85. The Panel unanimously decides to make no recommendation in support of the appeal."

On 8 September 1988, the Officer-in-Charge for the Department of Administration and Management informed the Applicant that the Secretary-General, having re-examined the case in the light of the Board's report had decided to maintain the contested decision and to take no further action on his case.

On 10 February 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant and his family were injured because of medical malpractice by the Respondent.

2. The Applicant and his family suffered mental anguish because of defamation of the Applicant's character by the Respondent.

3. The conduct by the Respondent caused material and physical damage to the Applicant's job opportunities.

4. The Respondent violated the Applicant's rights to due process of law.

5. The Applicant did not appeal to the JAB the administrative decision dated 23 April 1986, and therefore the JAB had no basis for considering any issues arising out of that decision.

Whereas the Respondent's principal contentions are:

1. Fixed-term appointments carry no expectancy of renewal or conversion to any other type of appointment.

2. One of the paramount considerations in the appointment of staff is to ensure that they meet the highest standards of integrity.

3. Neither the initial decision not to offer the Applicant a new fixed-term appointment, nor the decision to withdraw the offer of re-employment, was discriminatory.

4. No compensation is due to the Applicant.

5. Consideration of the Applicant's claims not raised in the JAB proceedings is not within the competence of the Tribunal in view of paragraph 1 of article 7 of its Statute.

The Tribunal, having deliberated from 24 April 1990 to 11 May 1990, now pronounces the following judgement:

I. The Applicant served the Organization since 1 May 1982 as a Security Officer in the Field Service category. He was assigned to UNTSO and was granted a succession of fixed-term appointments until 31 May 1985, the expiration date of his contract.

II. The Applicant appeals against the administrative decision conveyed to him on 14 January 1985, that he could not be medically cleared for an extension of his fixed-term appointment. He claimed that he was wrongly separated.

III. The Tribunal will examine whether the decision by the Secretary-General not to renew the Applicant's fixed-term appointment on medical grounds, has violated the Applicant's rights. In order to do so, the Tribunal will ascertain whether the provisions on medical classification and medical clearance were properly applied in his case.

IV. Under Staff Regulation 4.6: "The Secretary-General shall establish appropriate medical standards which staff members shall be required to meet before appointment". In PD/2/80/Rev.1 of 28 September 1984, these standards are spelled out. Paragraph 7 of that directive sets out the procedures for medical clearance after initial appointment, inter alia, for extension of appointment. According to these provisions, when the Applicant was recruited, he was found medically fit and his classification was 1A. Later on he underwent another medical examination and once again his medical classification was 1A.

V. The Tribunal notes that the next medical examination for the purpose of clearing the Applicant medically for the extension of his appointment was vitiated by errors which led to the non-extension of his appointment. The examination in question was conducted on the occasion of the extension of his fixed-term appointment effective 1 October 1984, which was renewed for three months pending medical clearance.

VI. The errors started with the diagnosis made by the first United Nations examining physician, Dr. Avramov, at the Applicant's duty station. Dr. Avramov stated in the periodic medical examinations made on 27 July and 30 November 1984, that the Applicant had a defect in his heart and a hernia. Both diagnoses by Dr. Avramov later proved to be incorrect. Moreover, according to the Applicant, Dr. Avramov examined him on 2 May 1984. Having diagnosed mitral stenosis, he referred the Applicant to a specialist in cardiology, Dr. Bishara, on 8 May 1984, for further medical examination and consultation. Dr. Bishara, after examining the Applicant, gave him a clean bill of health certificate. The Applicant forwarded the certificate to Dr. Avramov.

VII. The Tribunal considers in this respect that Dr. Avramov, as a generalist, should either have accepted the cardiologist's verdict, or at least have referred Dr. Bishara's report to the U.N. Medical Director in New York, together with the results of his own medical examination of the Applicant on 27 July and 30 November 1984. Unfortunately, he appears to have done neither.

VIII. On 3 January 1985, the U.N. Medical Director, relying on the above-mentioned reports forwarded to him by Dr. Avramov, decided that the Applicant should be medically classified as 2A, and therefore not medically fit for an extension of his present contract.

IX. On 23 January 1985, the Applicant was examined by the U.N. Medical Director in New York. While he cleared him of the hernia, he upheld the original erroneous diagnosis concerning the Applicant's heart defect. On 24 January 1985, the U.N. Medical Director informed the Administrative Officer, OFOESA, of the following:

> "Further to my 3 January memorandum the [Appellant] was examined by myself and our cardiologist in the Medical Service on 23 January. His medical classification has to remain, unfortunately as 2A, but I will be quite willing on compassionate grounds to medically clear him for an extension of another three months, for him to settle his personal affairs."

X. The Applicant made strenuous efforts to rebut his 2A medical classification by invoking three medical examinations in his favour. The first, by Dr. Bishara, mentioned above, on 8 May 1984; the second, by his personal family physician who examined him on 31 December 1984, and the third, by a cardiologist from the Cardiology Assembly of Palm Beach, Florida, who examined him on 21 January 1985. The efforts of the Applicant to prove that his heart was healthy were of no avail and they failed to alert the Medical Service in New York that there might be something wrong with the original diagnosis of the first United Nations examining physician at the Applicant's duty station, as well as subsequent diagnoses to the same effect.

XI. It was only after his appeal to the JAB that on 1 August 1985, the U.N. Medical Director expressed both his readiness to reclassify the Applicant medically as 1A and his hope that he could be reinstated as a Field Service Officer as soon as possible. The U.N. Medical Director reversed his earlier recommendation after seeing in the appeal file a report from an Israeli cardiologist, Professor Stern, which he had not seen before, indicating that the heart valves were normal. Professor Stern had examined the Applicant upon the referral of Dr. Avramov, after the Applicant had been examined in New York by the U.N. Medical Director on 23 January 1985.

XII. Medical clearance for further employment in the U.N. having been re-established, the question arises whether the Organization is legally bound to renew the Applicant's fixed-term appointment.

In his statement before the JAB, the Respondent answered this question in the negative. He expressed his opinion as follows:

> "However, even had the appellant been given the highest medical classification of '1A', the Organization was under no obligation to renew his appointment and he had no right, contractually or under the Staff Rules, to employment beyond the expiry of his last appointment."

XIII. The Tribunal observes first, that under the provisions of Staff Rules 104.12(b) and 109.7(a) and in all the Applicant's letters of appointment, it is stated that fixed-term appointments do not carry any expectation of renewal nor of conversion to any other type of appointment and expire automatically and without prior notice on the expiration date specified in the letter of appointment. According to Staff Rule 109.7(b), separation as a result of the expiration of any such appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Rules. Consequently, according to these provisions, the holder of a fixed-term appointment has no right, as a rule, to extension or further employment.

XIV. The Tribunal, in its Judgement No. 142, Bhattacharyya (1971) and in subsequent decisions, has held that expectancy of future employment by holders of fixed-term appointments is not necessarily to be decided by the

wording of Staff Regulations and Rules and letters of appointment, but may take into account the totality of circumstances existing at the time of the staff member's separation from service.

XV. In reviewing the circumstances of this case, the Tribunal finds that the Secretary-General duly fulfilled the Applicant's expectation of renewal of his appointment by offering in good faith to reinstate him, following the new recommendation of the U.N. Medical Director clearing the Applicant for further employment. The Tribunal observes that the offer was reasonable and conditional on the Applicant accepting its terms. The Applicant did not agree with the offer and made counter-offers of his own. The Secretary-General had no obligation to accept the counter-offers. The end result was that the offer did not materialize in a meeting of the minds of the two parties, and the Applicant's expectancy of continued employment ended.

XVI. However, the Tribunal finds that the failure by the Administration to exercise due diligence in the handling of the Applicant's medical evaluation entails the legal responsibility of the Organization. The Tribunal considers that under the circumstances of this case, the Applicant should be awarded monetary compensation for the direct material and moral injury to which he was subjected. The Tribunal fixes the amount of compensation at six months net base salary.

XVII. The Applicant submits a claim for compensation for medical malpractice by the doctors involved. The Tribunal finds that the compensation awarded in the preceding paragraph is adequate relief for the errors in connection with the Applicant's medical classification. The Tribunal does not find, on the facts of this case, any medical malpractice.

XVIII. The Applicant also claims compensation because his separation on medical grounds was discriminatory. After reviewing all the information before it, the Tribunal does not find any evidence that the contested decision was vitiated by discrimination or motivated by prejudice or any extraneous factor. On the contrary, the available evidence shows that the

Respondent extended the Applicant's contract on compassionate grounds until 31 May 1985, to settle his personal affairs and the Respondent made a reasonable offer in good faith to reinstate the Applicant on full pay as of 1 June 1985.

XIX. The Applicant complains that the Respondent introduced into his appeal before the JAB new and unrelated facts, contrary to Staff Rule 112.2(h). The Tribunal notes indeed that, during the proceedings before the JAB, new issues were raised by the Respondent, which the Applicant asserted he had not appealed to the JAB, and the JAB exercised jurisdiction over them.

These issues involve:

(a) A dispute over the settlement of some pending entitlements due to the Applicant upon separation, consisting of an insurance claim and destination charges in respect of his unaccompanied shipment; and

(b) An administrative decision conveyed to the Applicant on 23 April 1986, stating that he was no longer being considered for re-employment in the United Nations.

XX. These new issues had not been raised, either in the Applicant's original letter to the Secretary-General of 6 March 1985, or in his letter dated 14 June 1985, by which he instituted the proceedings before the JAB.

XXI. The Tribunal recalls Judgement No. 459, Moore-Woodroffe (1989), para. XIII, in which it stated:

> "The Tribunal recalls its disapproval of attempts to raise new issues which have not been properly put before the JAB by an Applicant. See Judgement No. 446, San José (1989) and No. 449, Janitschek (1989)."

XXII. The Tribunal therefore finds these new issues to have been beyond the scope of the jurisdiction of the JAB as constituted to consider the Applicant's appeal. And since the Secretary-General and the Applicant did not enter into an agreement to submit these new issues directly to the

Tribunal in accordance with paragraph 1 of article 7 of the Tribunal's Statute, they are not receivable and the Tribunal cannot enter into their merits.

XXIII. For the foregoing reasons, the Tribunal:

1. Orders the Respondent:

(a) To pay to the Applicant a sum equal to six months net base salary as compensation;

(b) To correct the Applicant's medical record, if this has not yet been done, to show that as of 9 August 1985, the Applicant was medically fit for United Nations employment.

2. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

Geneva, 11 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

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ADMINISTRATIVE TRIBUNAL

Judgement No. 472

Case No. 494: BEYELE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas, at the request of François Tewane Beyele, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 16 January 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 January 1989, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

The Applicant requests the Tribunal:

1. To rescind the decision of the Secretary-General of 13 July 1988 (...) which was based on the recommendations of the Joint Appeals Board dated 8 July 1988 (...) on an appeal of the Applicant who was requesting that the Special Post Allowance which was granted to him be paid at the P-5 level in accordance with Staff Rule 103.11(d) (...).

2. To decide that the level of the Special Post Allowance which had been granted to the Applicant should be paid at the P-5 level, in accordance with the Staff Rule 103.11(d).

3. To order:

(a) That the United Nations shall pay to the Applicant the amount corresponding to the difference, for the period from 6 January 1985 to 14 May 1986, between the salary he received and the salary he would have received if he had been paid at the P-5, Step I level (corresponding to a Special Post Allowance at the P-5 level);

(b) That the payment be done at latest the last day of the full month following the date of the communication of the Tribunal to the Applicant;

(c) That, if he does not follow the decision of the Tribunal concerning the modality of payment, the Respondent will pay an interest on the totality of the amount due equal to the prime rate existing in New York at the date of the payment, as published in the WALL STREET JOURNAL, with the addition of one point."

Whereas the Respondent filed his answer on 17 March 1989;

Whereas the Applicant filed written observations on 12 April 1989;

Whereas the Applicant submitted further observations on 27 March 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 July 1975. He was initially offered a two year fixed-term appointment as an Associate Economic Affairs Officer at the P-2, Step IV level, in the Economic Commission for Africa (ECA) in Addis Ababa. He was assigned to the Joint ECA/FAO [Food and Agriculture Organization] Agriculture Division (JEFAD). The Applicant's appointment was extended for a further fixed-term period of two years and he was promoted to the P-3 level on 1 April 1978. On 3 July 1979, he was offered a probationary appointment and on 1 April 1980, a permanent appointment.

In a memorandum dated 14 May 1985, the Director, JEFAD, requested the Chief, Personnel Section, ECA, to pay the Applicant a Special Post Allowance (SPA) to the P-5 level, under Staff Rule 103.11. He confirmed that the Executive Secretary had officially assigned the Applicant as Officer-in-Charge of the Agricultural Marketing Section (AMS) from 19 October 1984. He

noted that, even though the previous Chief of Section had served at the P-4 level, the post should be classified at the P-5 level. In a reply dated 7 November 1985, the Chief, Personnel Section, ECA, rejected his request on the ground that the post encumbered by the Applicant was funded by FAO and consequently, ECA was not in a position to request FAO "to finance this allowance for an ECA staff member".

In August 1985, ECA submitted the Applicant's job description to the Headquarters Classification Section of the Office of Personnel Services (OPS) for classification review. In a Classification Notice dated 26 August 1985, approved by the Assistant Secretary-General, OPS, the classification of the post was confirmed at the P-3 level. The note stated: "No further analysis is required for this post unless there is a change in assigned responsibilities and duties". In a memorandum dated 4 December 1985, the Applicant, supported by his Director, challenged that decision, pointing out that the duties he was actually performing as Chief of Section had drastically changed in the past two years. He stated: "I believe P-4 [level] is the minimum in order to correct my administrative position".

In a memorandum dated 25 February 1986, an Officer at the Classification Section, OPS, informed the Applicant that, in classifying his post, no credit had been given to elements in the job description pertaining to activities of Officer-in-Charge, because they had been considered as "temporary and therefore not part of the job under evaluation". However, since they now understood that the job description reflected the duties of the post of Chief, AMS, he advised the Applicant to re-submit the job description of this post for classification review.

On 7 May 1986, ECA submitted to the Classification Section, OPS, a new request for classification of the Applicant's post. In a cable dated 6 June 1986, an officer at the Classification Section asked the Officer-in-Charge, Personnel Section, ECA, to clarify certain matters relating to the functions of Chief of Section and the funding of the post.

In a reply dated 8 July 1986, the Director, JEFAD, noted that the difficulties surrounding payment of an SPA to the Applicant appeared to

result from the non-observance of a Memorandum of Understanding signed in 1959 and amended in 1977 and 1981 between ECA and FAO concerning staff of JEFAD. He noted that according to article 2 of that Memorandum of Understanding, only the Director of JEFAD, was required to be an FAO staff member; all other staff were appointed by both Organizations, each of the Organizations being "responsible for salaries and other allowances of its staff". Since the Applicant was an ECA staff member, ECA was responsible for payment of his SPA, just as FAO was responsible for payment of allowances for staff appointed by the Director general.

In the meantime, on 14 May 1986, the Applicant was dismissed for misconduct.

In a letter dated 5 September 1986, the Applicant asked the Assistant Secretary-General, OPS, whether any action had been taken by the Administration concerning payment of his SPA. On 21 October 1986, the Chief, Administrative Review Unit, informed the Applicant that the Administration would conduct administrative review of his case. Not having received a further reply from the Secretary-General, the Applicant lodged an appeal with the Headquarters Joint Appeals Board (JAB) on 13 January 1987.

On 9 July 1987, the Classification Section, Office of Human Resources and Management (OHRM*), classified the post of Chief, AMS, at the P-5 level. The Classification Notice stated: "Functions classified in response to a request for an SPA. Functions should be reviewed upon long-term agreement between FAO/ECA on the status of the Chief of Section post".

According to a statement by the Respondent, when OHRM reviewed the Applicant's request, it was agreed that, although payment of an SPA was discretionary, the Applicant would probably have received an SPA but for the confusion between ECA and FAO as to who was responsible for payment of the SPA and for the confusion between Headquarters and ECA/FAO concerning the classification of the post. The Assistant Secretary-General, OHRM, therefore authorized payment of an SPA to the Applicant at the P-4 level, for the period running from 6 January 1985 to 14 May 1986, the date of his

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* Successor of OPS.

separation from service, on the condition that the Applicant withdraw his appeal before the JAB and in full and final settlement of the appeal. In a cable of 31 March 1988, the Applicant was advised of this offer and also informed that pursuant to Personnel Directive PD/1/84 an SPA was not payable at more than one level higher than that of the staff member's grade.

In a letter of 12 April 1988, the Applicant rejected the offer of settlement, on the grounds that under Staff Rule 103.11, he should be paid an SPA to the P-5 level, the level of the post in which he was serving. On 13 April 1988, the Applicant requested review of the case by the JAB.

The JAB adopted its report on 8 July 1988. Its conclusions and recommendation read as follows:

"Conclusions and recommendation

24. (a) The Panel finds that the Classification Section, OHRM, reclassified the post of the Chief, Agricultural Marketing Section in the ECA/FAO Agriculture Division to the P-5 level for SPA purposes on 9 July 1987 i.e. thirteen months after the appellant had separated from the service of the Organization.

(b) The Panel therefore finds that the appellant during the period of service as Officer-in-Charge of the Agricultural Marketing Section, ECA/FAO Agriculture Division, was serving against a P-4 post.

(c) The Panel finds that the approval of the ASG [Assistant Secretary-General], OHRM, granting the appellant SPA to the P-4 level was consistent with the rules, policy and practice of the Organization.

(d) The Panel recommends that the offer of SPA to the P-4 level to the appellant for the period involved be renewed and payment made effective 6 January 1985 through his separation date.

25. The Panel makes no other recommendation in support of the appeal."

On 13 July 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided:

> "... in final settlement of [his] case, to grant [him] a Special Post Allowance (SPA) to P-4 level for the period 6 January 1985 to 14 May 1986, the date of [his] separation from service, as authorized by the Assistant Secretary-General for Human Resources Management and offered to [him] on 1 April 1988, and to take no further action on [his] case".

He added:

> "I should like to note in this connection that, in accordance with Staff Rule 103.11(b) and Personnel Directive PD/1/84, paragraph 8, granting of an SPA is within the discretionary authority of the Secretary-General, in exceptional circumstances, and not normally payable at more than one level higher than that of the staff member. Furthermore, according to established policy and practice, reclassifications of posts do not have retroactive effect."

On 12 January 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Under Staff Rule 103.11 if an SPA is granted to a staff member at the P-3 level, performing functions at the P-5 level, on a post classified at the P-5 level, the SPA should be paid to the P-5 level.

2. The Respondent's decision of 9 July 1987, classifying the post of Chief, AMS, at the P-5 level, applies to the period for which an SPA was granted to the Applicant.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision of 9 July 1987, classifying the post of Chief, AMS, at the P-5 level, does not retroactively apply to the period for which an SPA was granted to the Applicant.

2. Under Staff Rule 103.11 and the other relevant rules and procedures issued by the Respondent to govern the grant of SPAs, the amount of SPA payable to the Applicant was limited to the salary increase he would have received had he been promoted from P-3 to P-4.

The Tribunal, having deliberated from 25 April 1990 to 11 May 1990, now pronounces the following judgement:

I. The application is directed against the decision by the Respondent to grant the Applicant a Special Post Allowance (SPA) to the P-4 level, instead of an SPA to the P-5 level.

II. The Tribunal notes that the Applicant, a staff member at the P-3 level, was designated, effective 19 October 1984, as Officer-in-Charge of the Agricultural Marketing Section (AMS) in the Joint ECA/FAO Agriculture Division. He served in that capacity until his separation from service on 14<May 1986 and he was offered an SPA to the P-4 level, for the period during which he had been in charge of that post.

III. The Applicant contends that the SPA which had been granted to him should be paid at the P-5 level, in accordance with Staff Rule 103.11(d), as interpreted by him.

IV. The Tribunal observes that Staff Rule 103.11(d), in force at the time the Applicant was serving as Officer-in-Charge, provided that: "The amount of the special post allowance shall be equivalent to the salary increase ... which the staff member would have received had the staff member been promoted to the level of the post in which he or she is serving."

V. The Tribunal also observes that Personnel Directive PD/1/84 of 1 March 1984, which provides guidelines for the application of Staff Rule 103.11, states in paragraph 8 that: "The SPA is not normally payable at

more than one level higher than that of the staff member except when a staff member at the General Service level is granted an SPA to the Professional level ...".

VI. The Tribunal takes note that the Respondent decided, as appears from the Report of the Secretary-General on Personnel Questions to the Fifth Committee of the General Assembly (A/C.5/44/2) of 20 September 1989, to amend Staff Rule 103.11(d) by replacing the sentence: "The amount of the special post allowance shall be equivalent to the salary increase ... which the staff member would have received had the staff member been promoted to the level of the post in which he or she is serving" by a new sentence: "The amount of the special post allowance shall be equivalent to the salary increase ... which the staff member would have received had the staff member been promoted to the next higher level." (emphasis added).

VII. In the view of the Tribunal, this was a clarifying amendment to Staff Rule 103.11(d), establishing the amount to be received by staff members who are granted an SPA. It reflects the practice in existence prior to the amendment, which precludes inter alia a staff member serving at the P-3 level from receiving an SPA to the P-5 level.

VIII. At the same time the Tribunal considers that it is necessary to recall other relevant elements of the practice of the United Nations in the matter of payment of an SPA. As indicated in Judgement No. 154, Monasterial (1972), para. VIII, reproducing a statement by the Respondent, in reply to a question put by the Tribunal:

> "[the] Secretary-General consistently exercises his discretion under Staff Rule 103.11 only in cases where he may effect payment of allowance with funds allocated to post at higher level authorized by official manning table approved in budget by General Assembly. Under budgetary procedure, Secretary-General cannot consider granting allowance attaching to post which does not exist in official manning table."

IX. In this respect, the Tribunal recalls its own opinion, as expressed in the above mentioned Judgement, para. IX:

> "... the criterion that the assumption of higher responsibilities for the purposes of a special post allowance should be evidenced by assignment to a post at the higher level on the official manning table is a reasonable one and within the authority of the Secretary-General to prescribe."

X. In the present case, the Tribunal finds that during the period of his service as Officer-in-Charge, AMS, the post the Applicant was encumbering was invariably at the P-4 level, as evidenced by other staff members who encumbered the same post prior to him at the identical level. Consequently, if the Applicant had been promoted at that time, he would have been promoted to the P-4 level and not to the P-5 level, a post which did not exist on the official manning table.

XI. The Tribunal notes that only on 9 July 1987, i.e. 13 months after the Applicant had separated from the service of ECA, the post of Chief, AMS, in the Joint ECA/FAO Agriculture Division was reclassified to the P-5 level by the Classification Section of the Office of Human Resources and Management (OHRM).

XII. It is the view of the Tribunal that the decision by the Respondent of 9 July 1987, classifying the above-mentioned post at the P-5 level, does not have retroactive effect to the period for which an SPA to the P-4 level was granted to the Applicant. In the circumstances, that decision only had prospective effect and any question of its retroactive application to staff members serving on that post prior to its reclassification becomes irrelevant.

XIII. In the light of the above, the Tribunal concludes that the Secretary-General's decision dated 13 July 1988, to grant the Applicant an SPA to the P-4 level, for the period 6 January 1985 to 14 May 1986, the date of his

separation from service, is in accordance with the terms of PD/1/84 of 1 March 1984, and is consistent with the rules, policy and practice of the United Nations. The Tribunal finds no justification for the payment of an SPA to the P-5 level.

XIV. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

Geneva, 11 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/473
11 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 473

Case No. 500: DODD

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Arnold Kean; Mr. Francisco A. Forteza;

Whereas, at the request of Robert Alan Dodd, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 10 February 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 6 February 1989, the Applicant filed an application, the pleas of which read as follows:

"PLEAS ...

(a) Preliminary measures:

Applicant requests copies of any and all records of the Advisory Panel on External Studies regarding their recommendation on Applicant's request for assistance in August 1987 and in 1985 and an opportunity to provide comment on these records as appropriate.

(b) Decision contested:

Applicant contests the apparent October 1987 decision of the Assistant Secretary-General for Human Resources Management denying assistance to participate in external studies in the form of Annual Conference of the International Personnel Management Association.

(c) Obligation invoked:

Applicant invokes the obligation under Staff Regulation VIII of the United Nations and the Secretary-General, as its Chief Administrative Officer, to afford equitable representation to all staff members.

(d) Compensation claimed:

Compensation of [US]$920 for costs associated with external studies;
Compensation for four days of annual leave expended in lieu of special leave to attend external studies;
Compensation not less than [US]$3,000 for failure to provide equitable representation."

Whereas the Respondent filed his answer on 15 March 1989;

Whereas the Applicant filed written observations on 27 March 1989;

Whereas the facts in the case are as follows:

Robert Alan Dodd entered the service of the United Nations on secondment from the Government of the United States of America on 21 April 1980. He was initially offered a three month fixed-term appointment at the P-4, Step IV level as a Classification Officer in the then Office of Personnel Services (OPS). The Applicant subsequently served on a series of further fixed-term appointments until 31 March 1988, when he separated from the service of the Organization. From 10 January 1985, the Applicant served as Acting Chief, Classification Section, at the Division for Policy Co-ordination, OPS.

On 25 August 1987, the Applicant sought approval, under ST/AI/281, concerning the U.N. External Studies Programme, to attend the International Conference on Public Personnel Administration, in Ottawa, Canada, for a period of four days running from 4 to 8 October 1987. The Applicant's request was endorsed by the Applicant's supervisor, the Director of the Division for Policy Co-ordination, who noted that the conference would "provide [the Applicant] with information of a number of current developments which may be used by the United Nations in adapting job classification to the needs of the UN and to the technological and organizational changes taking place". The request was also endorsed by the Executive Office of the Department of Administration and Management.

On 7 October 1987, the Secretary of the Advisory Panel on External Studies informed the Applicant that the Panel had recommended against the Applicant's request on the ground that "the Panel considered issues to be discussed at the conference not specific to the work of the Classification Section". According to the record of the case, the Panel approved attendance to the same conference for two other staff members of the Office of Human Resources Management* (OHRM).

The Applicant attended the conference at his expense, and although he received no financial assistance from the United Nations, submitted on 20 October 1987, a report on the conference to the Training and Examinations Service, OHRM, as required by ST/AI/281 which provides that staff members receiving assistance in pursuing external studies should submit "a concise report on the studies undertaken, their relevance and possible value for other staff members ...".

On 20 October 1987, the Applicant requested the Secretary-General to review the decision by the Advisory Panel on External Studies, denying his request for assistance to attend the conference. Having received no reply from the Secretary-General, on 3 and 23 February 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 27 July 1988. Its conclusions read as follows:

> "Conclusions
>
> 14. The Panel concludes that the provisions of ST/AI/281 were properly applied in considering the request of the appellant for funding his participation in the Conference.
>
> 15. The Panel further concludes that there is no evidence that the Advisory Panel on External Studies had been unfair or inconsistent in arriving at its decision.
>
> 16. Accordingly, the Panel makes no recommendation in support of the appeal."

On 16 August 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision and to take no further action on the case.

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* Successor of OPS.

On 6 February 1989, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB did not grant the Applicant's counsel his request for an oral hearing and did not properly review the substance of the case thus denying the Applicant due process of law.

2. The Advisory Panel on External Studies discriminated against the Applicant because one of its members, an elected representative from the U.N. Staff Committee, was personally biased against him.

3. An elected official of the Staff Union, fulfilling union activities, should not sit in the Advisory Panel in contravention of the Staff Regulations and Rules.

Whereas the Respondent's principal contentions are:

1. The grant of paid external study leave is discretionary. Consequently, a staff member cannot challenge the merits of a decision rejecting an application for such leave.

2. The modalities of considering staff for study leave are set out in an Administrative Instruction. Staff do not have a right to be considered by other methods of selection.

The Tribunal, having deliberated from 30 April 1990 to 11 May 1990, now pronounces the following judgement:

I. The Applicant's claim arises from his failure to obtain assistance under the external studies programme authorized by the General Assembly. ST/AI/281 of 17 June 1981 is the relevant Administrative Instruction, which states its purpose to be "to outline the procedures by which staff members may apply for assistance under the external studies programme authorized by the General Assembly in the interest of the Organization and to describe the conditions under which assistance will be granted" (emphasis added) (para. 1). Para. 2 states inter alia that "Assistance will be granted only when the studies are clearly in the interest of the Organization".

II. The Administrative Instruction therefore makes it quite clear that the primary purpose is to benefit the Organization, not to confer on the staff member a right to engage in external studies, though he seems likely to benefit incidentally from them.

III. ST/AI/281 replaced ST/AI/243 of 15 April 1977, with no amendments material to the present case. ST/AI/243 was considered by the Tribunal in Judgement No. 263, Elmoznino (1980), in which the view was expressed that "the Instruction did not confer a right to be granted assistance". The same conclusion must be reached with regard to ST/AI/281. It would be for consideration whether, if the Respondent's refusal to grant assistance in the present case had been faulted by procedural or other defects (which in the Tribunal's view it was not) the Applicant would have been entitled to compensation on that account. But no such issue is presented in this case.

IV. The Applicant bases his claim not on a failure to follow the prescribed procedure in ST/AI/281, but on the alleged prejudice against him on the part of one of the three members of the Advisory Panel which advised the Respondent to refuse to grant assistance. That Panel, under para. 10 of ST/AI/281, was appointed by the Secretary-General and was composed of the Director of the Division of Personnel Administration, OPS, as Chairman, and two other members, one of them appointed on the recommendation of the Staff Committee. The member appointed on the recommendation of the Staff Committee was in fact its President who, when the pressure of other business so required, substituted the First Vice-President of the Staff Committee. In consequence, the membership of the Panel changed from time to time, but the third member was always an elected official of the Staff Committee.

V. The Respondent does not deny that the Applicant was disliked by the Staff Committee, as evidenced by the reference to "Doddism" in its publication "U.N. Report", February 1986, and other adverse observations. Perhaps this may have affected one of the three Panel-members (the member appointed on the recommendation of the Staff Committee), but there is no evidence that it affected the other two. The Panel unanimously advised that

it "considered issues to be discussed at the Conference not specific to the work of the Classification Section", a conclusion which could, in the Tribunal's view, have been reasonably reached by any Panel, however composed. For that reason, the Applicant's proposed studies in Ottawa were not considered to be "clearly in the interest of the Organization" as required by ST/AI/281. The Tribunal therefore does not accept the Applicant's contention that the denial of his request for assistance was due to prejudice or, as he puts it, the failure of the Respondent to "afford equitable representation [on the Panel]".

VI. The Applicant has contended that an elected official of the Staff Committee ought not to be a member of a Panel dealing with the case of an individual staff member. ST/AI/281 is silent on this point and the Staff Rules do not explicitly address the question of bias or conflict of interest, actual or apparent, in connection with membership of such a Panel. These important matters are, however, for consideration by the Administration rather than by the Tribunal.

VII. Furthermore, the Tribunal does not consider that proof of prejudice can be found in the grant of assistance to two staff members other than the Applicant. Bearing in mind the limited resources of the Organization, mentioned in ST/AI/281, para. 7, a choice had to be made, and the Panel was of the opinion that the subject-matter of the Conference was more closely related to the work of the other two staff members than to that of the Applicant.

VIII. The Applicant arranged to attend the Ottawa Conference at his own expense, and then claimed reimbursement from the Administration. This, in the view of the Tribunal, in no way strengthened his claim.

IX. The Applicant claims to be entitled to compensation on the ground that the Joint Appeals Board (JAB) had deprived him of due process, in not granting him an oral hearing. It is, however, beyond doubt that the JAB may, if it thinks fit, dispense with oral argument if it considers that the case has been sufficiently presented.

X. The Tribunal has learned, since starting its deliberations on this case, that the Applicant has passed away.

The Tribunal wishes to record that there is no further evidence it would have requested from the Applicant had he still been in a position to provide it.

XI. For the foregoing reasons, all of the Applicant's pleas, including his request for the production of documents, must be rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Francisco A. FORTEZA
Member

Geneva, 11 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/474
14 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 474

Case No. 471: COSH

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Ahmed Osman, Second Vice-President; Mr. Samar Sen;

Whereas, at the request of James Alexander Logan Cosh, a former staff member of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 June, 15 September and 31 December 1986, 31 March, 30 June, 30 September and 31 December 1987, 31 March and 31 May 1988, the time-limit for the filing of an application;

Whereas, on 27 May 1988, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

1. The Tribunal is requested to rule as follows:

(a) that the Respondent was consistently unfair to the Applicant, as IMO's Regional Marine Pollution Adviser in Latin America, and discriminated in favour of the Assistant Regional Marine Pollution Adviser, Mr. Vergara, who took up his duties in Santiago, Chile, in October 1978;

(b) that the Respondent placed the Applicant in a disadvantageous position in relation to Mr. Vergara by not clearly defining the working relationship and division of duties between the two advisers, and between them and the officials to whom they were both responsible at the Headquarters of IMO;

(c) that the Respondent, by allowing and encouraging Mr. Vergara to act in a manner that was increasingly independent of the Applicant, and by progressively transferring duties to Mr. Vergara that were properly those of the Applicant, deliberately left the Applicant more and more isolated and placed him in an invidious position;

(d) that the acceptance by the Respondent of notes written by Mr. Vergara which were critical of the Applicant and which the Applicant was given no opportunity to see, and of which he was not even aware at the time, and the placing of such notes in the official files at the Headquarters of the Organization, amounted to a gross failure of good management practice and did the Applicant a grave injustice;

(e) that the Respondent failed to give the Applicant the support that he needed and was entitled to expect in order to do his work effectively, in particular by not responding to his written and other requests to his supervisors to regulate certain aspects of his professional duties and of the work of the IMO office in Santiago;

(f) that the Respondent was in breach of the principle of good faith in not explaining to the Applicant more fully and frankly the true reasons for not renewing his contract, in particular in respect of the Organization's interest in UNDP [United Nations Development Programme] funding for the World Maritime University;

(g) That the abrupt way in which the decision was taken to abandon the plan to transfer the Applicant to the Caribbean and not to renew his contract at the end of 1983, and the failure to explain the circumstances to him frankly and unequivocally, was insensitive and paid insufficient regard to the Applicant's feelings, and was not in accordance with the principles of good management;

(h) that the interpretation made by the Respondent of the rules relating to home leave and other personnel issues was unduly rigid and formalistic and caused needless and unjustifiable inconvenience to the Applicant;

(i) that the refusal by the Organization to meet the cost of a family visit by the Applicant's wife in 1981 was a denial of an entitlement accruing to the Applicant and was a clear violation of the staff rules.

2. Accordingly, the Tribunal is requested to order the Respondent to pay to the Applicant a sum equal to two years' net base salary by way of compensation to him for the unsatisfactory aspects of his employment with IMO, including the denial of his entitlement to a family visit in 1981 at the expense of the Organization and the expenses incurred by him for typing, translation and other items, such award to absorb all the specific claims detailed in the present application."

Whereas the Respondent filed his answer on 4 October 1989;

Whereas the Applicant filed written observations on 21 November 1989;

Whereas, on 16 March 1990, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 27 March 1990, the Tribunal put questions to the Respondent, and on 4 April 1990, he provided answers thereto;

Whereas, on 2 April 1990, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

James Alexander Logan Cosh was recruited by IMO on 1 July 1977 as a Marine Pollution Adviser for Latin America. He served initially on two successive one year fixed-term appointments at the L-5 level, on secondment from the Government of the United Kingdom of Great Britain and Northern Ireland, through 30 June 1979. The Applicant's duty station was Santiago de Chile, Chile. His duties were set forth in an attachment to his initial letter of appointment and were identical to those specified in a vacancy announcement dated 1 January 1977, which had prompted the Applicant's candidature for the post.

In July 1978, IMO appointed Mr. Ignacio Vergara, a Chilean national, as an Assistant Regional Marine Pollution Adviser for Latin America to be stationed as well in Santiago de Chile. The Applicant asserts that this appointment was made by IMO "as a favour to UNDP [United Nations Development Programme], and particularly to Mr. Valdés [Director of the Regional Bureau

for Latin America] whom [the Applicant] believes to be a relative of Mr. Vergara, and that, as part of the arrangement, UNDP had agreed to finance an IMO post in Colombia as requested by the Secretary-General". In addition, the Applicant asserts that, although the post of Assistant Marine Pollution Adviser was described by the Administration, in correspondence exchanged related to its establishment, as a "'junior post', the exact status of Mr. Vergara and his administrative relationship to the Applicant was somewhat vaguely defined".

According to Mr. Vergara's terms of reference as Assistant Adviser, he was to "work under the supervision of the Director of Technical Co-operation Division or other as may be designated by the Secretary-General of the Organization ... with, and under the guidance of, the Regional Marine Pollution Adviser for Latin America. ... He [would] assist the Marine Pollution Adviser in the overall aspects related to controlling and/or combatting of Marine Pollution...". The Applicant argues that "the distinction between working 'under the supervision of the Director ... Technical Co-operation Division [TCD]' and 'with, and under the guidance of, the Regional Marine Pollution Adviser for Latin America' proved to be one of the most unsatisfactory aspects of the relations between the Applicant and Mr. Vergara and between them and IMO Headquarters" because the lines of authority were not clearly defined. Mr. Vergara took over a number of the Applicant's functions and did not intend "to act under his supervision but, on the contrary, to have a considerable degree of independence". Although the Applicant asserts that he made "several requests to IMO to clarify his position ... [he] received no clear guidance or assistance. Consequently ... Mr. Vergara, as he gained confidence, was able to act in an increasingly independent manner while the Applicant became more and more isolated".

In early 1979, the United Kingdom Departments of Industry Trade and Prices and Consumer Protection, Marine Survey Service refused to extend the Applicant's secondment. The Applicant decided to remain an IMO staff member and resigned from the service of his Government.

On 21 June 1979, the Applicant was appointed Special Adviser to the "Marine Safety and Licensing" Project in Panama for a period of one year. The Respondent asserts that early in 1979, the Secretary-General considered

the possibility of transferring the Applicant to the Caribbean, since several countries had "expressed an interest in an IMO Adviser being placed in their respective countries". In an undated note for the file, the Regional Programme Officer for Latin America recorded a telephone conversation with the Secretary-General who was then in Jamaica, sometime "in the first five months of 1980", concerning this possibility. At the expiration of his assignment in Panama, the Applicant returned to Santiago de Chile on 13 July 1980.

The Applicant's appointment was subsequently extended as Marine Pollution Adviser for successive fixed-term periods of less than one year, until 30 June 1983. The Applicant asserts that during this period, Mr. Vergara continued to take over a number of his duties and prevented him from seeing incoming correspondence. In addition, he contends that there was an "increasing tendency of the IMO Secretariat to deal with Mr. Vergara rather than with the Applicant" and that "Mr. Vergara's practice of sending communications to IMO on his own initiative and without reference to the Applicant began quite soon after his appointment". The Respondent admits that when the Applicant returned to Santiago "the [work] situation ... and the fact that the Assistant Adviser had done good work in [the Applicant's] absence presented some friction between both officers, of which TCD was becoming gradually aware and concerned". On 12 August 1981, Mr. Vergara sent a confidential note to the Head of the Latin American Section, TCD, which contained criticism of the Applicant's actions and the quality of his work. This note was not made available to the Applicant, nor was he asked to comment on it. The Applicant asserts that "he became aware of its existence only when he found it in one of the files at IMO Headquarters which he consulted freely on his periodic visits to IMO Headquarters ...". He also asserts that officials at Headquarters failed to reply to his letters, adding considerably to the difficulties of his work.

During 1982, negotiations ensued to formalize the Applicant's transfer as an Adviser to the Caribbean Region. Discussions were held in March 1982, between the UNDP Assistant Administrator and Regional Director for Latin America and the Secretary-General, concerning the Applicant's appointment as Marine Pollution Adviser for the Caribbean and the location

of the Regional Office. Furthermore, on 2 September 1982, in three letters sent by the UNDP Assistant Administrator to UNDP Resident Representatives in Jamaica, Barbados and Trinidad, with a view to inquire whether they would agree to serve as host country for the project, it was mentioned that "the Bureau has agreed with the IMO that the duty station of Mr. James A.L. Cosh (U.K.), the Regional Adviser in Marine Pollution, would be changed from Santiago, Chile, to the Caribbean ...". The Applicant asserts that "the intention to transfer [him] to the Caribbean was also confirmed by the Secretary-General of IMO in a conversation with the Applicant on 5 August 1982". In April 1983, the Government of Barbados agreed to provide a headquarters for the adviser, but contrary to his expectations, the Applicant was not appointed to serve on the post. The Applicant contends that the Administration never informed him officially of this fact.

Although in a letter dated 29 March 1983, the Director, TCD, informed the Applicant that no funds were available at the time for an extension of his appointment, additional funding was subsequently obtained and his appointment was extended for a further fixed-term period until 31 December 1983. The Applicant was advised that it would not be possible to employ three advisers in 1984, and on 10 November 1983, the Director, TCD, informed the Applicant that his appointment would not be extended beyond its expiration date on account of "a drastic reduction in Development Co-operation funds" which "placed in jeopardy the IMO Regional Advisory activities under their present form and strength". On 31 December 1983, the Applicant was separated from the service of IMO.

On 29 June 1984, the Applicant requested review of the decision not to extend his appointment. On 3 September 1984, the Applicant informed the Respondent of his intention to file an appeal with the Joint Appeals Board (JAB). On 19 August 1985, the Applicant submitted his statement of appeal. The Board adopted its report on 24 January 1986. Its recommendations read as follows:

"5. Recommendations

5.1 In the light of the above considerations and conclusions, the Board wishes to submit the following:

5.1.1 The Board recommends that the Appellant's claim for compensation for the loss of pension rights for the period 1 January 1984 to 14 July 1987 be rejected for the reasons set out in ...;

5.1.2 The Board recommends that the Appellant's claim for compensation for the loss of salary and allowances for the period 1 September 1984 to 14 July 1987 be rejected for the reasons set out in ...;

5.1.3 The Board recommends that the Appellant's claim for reimbursement of the cost of solicitor's fee be rejected for the reasons set out in ...;

5.1.4 The Board recommends that the Appellant's claim for compensation for the losses incurred in selling the contents of his former residence in the United Kingdom (46 Headley Close, Brentwood) be rejected for the reasons set out in ...;

5.1.5 The Board recommends that the Appellant be paid a lump sum of $ 500 for the reasons set out in ...;

5.1.6 The Board recommends that the Appellant be awarded a pecuniary compensation in the amount of $ 10,000 for the reasons set out in ...".

On 21 February 1986, the Secretary-General informed the Applicant that, having re-examined the case in the light of the Board's report, he had decided to maintain the contested decision.

On 27 May 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent was consistently unfair to the Applicant as Regional Adviser in Latin America and discriminated in favour of the Assistant Regional Adviser.

2. The Respondent did not clearly define the working relationship and the division of duties between the two advisers.

3. The Respondent failed to follow his own rules.

Whereas the Respondent's principal contentions are:

1. The Secretary-General was fully entitled not to renew the Applicant's appointment.

2. No unfair or prejudicial actions were taken during the Applicant's employment.

The Tribunal, having deliberated from 30 April 1990 to 14 May 1990, now pronounces the following judgement:

I. In his pleas, the Applicant complained that the Respondent was "consistently unfair" to him and discriminated in favour of the Assistant Regional Marine Pollution Adviser, Mr. Vergara. To substantiate his claim, the Applicant has cited a series of grievances. The Tribunal has examined these grievances to determine whether they are well-founded and could be construed as infringements on his contractual rights.

II. The Applicant's first grievance is an alleged lack of clarity in defining, on the one hand, the working relationship and division of duties between the two advisers and on the other, between them and their superiors at Headquarters, and finally the Respondent's tacit consent to Mr. Vergara's acting in a manner that was increasingly independent of the Applicant, and gradually taking over the Applicant's duties.

In assessing this claim, the Tribunal takes into account the following considerations:

1. With regard to Mr. Vergara's initial appointment, the Tribunal takes note:

(a) That the Applicant himself acknowledged that he was pleased to learn that an assistant would be appointed, since he did not have sufficient time to look after the office routine in Santiago and to fulfil some of his duties as Regional Marine Pollution Adviser for Latin America;

(b) Of the Respondent's statement that the objective of appointing Mr. Vergara was to increase IMO's capability of responding to marine pollution in Latin America and not to damage the Applicant's standing.

The Tribunal finds, therefore, that the appointment of Mr. Vergara was in response to a genuine and objective need of IMO in Latin America.

2. With regard to the relationship between the two advisers and their superiors, the Tribunal notes that these were defined from the beginning, à propos of Mr. Vergara's terms of reference, as follows:

"The Assistant Marine Pollution Adviser for Latin America will work under the supervision of the Director of Technical Co-operation Division or other as may be designated by the Secretary-General of the Organization. He will work with, and under the guidance of, the Regional Marine Pollution Adviser for Latin America."

The Joint Appeals Board (JAB) has expressed some doubt on the practicability of this rather subtle differentiation between "supervision" and "guidance" and concluded that this created difficulties for the Applicant. In the Tribunal's view, taking into consideration the nature and circumstances of their assignment far away from Headquarters, and their involvement in ongoing projects, having to face unexpected events and being frequently absent on missions, such an arrangement seems reasonable and eventual difficulties arising from it are understandable. The Tribunal does not find this arrangement unfair to the Applicant or vitiated by discrimination in favour of Mr. Vergara.

III. With regard to the working relationship of the two advisers after Mr. Vergara's appointment, the Tribunal finds that it was natural that the Applicant found that his work-load decreased. The Applicant himself recognized that, as Mr. Vergara gained confidence, he was able to act in an increasingly independent manner. The Tribunal notes in this regard the view expressed orally by the Applicant before the JAB, when he stated that he should perhaps have been, on occasions, more forceful and determined in asserting his own position vis-à-vis Mr. Vergara and that he should have raised more promptly any problems at the Santiago Office with TCD.

IV. The Applicant's second complaint is the lack of administrative support and particularly, his superior's attitude in not responding to his various requests. The Applicant refers to instances when officials at Headquarters did not reply to his requests or queries. The Respondent on his part, provided a number of reasons to explain this situation. While the Tribunal does not ignore the Applicant's frustration in this regard, it considers this issue is more in the nature of an internal administrative matter, than one involving non-observance of the Applicant's terms of appointment.

V. The Applicant's next grievance relates to the acceptance by the Respondent of a note written by Mr. Vergara which was critical of the Applicant and which the Applicant was given no opportunity to comment upon. The note was kept in Mr. Vergara's file at Headquarters. The note in question was sent on 12 August 1981, by Mr. Vergara to the Head of the Latin American Section of TCD. It contained severe criticism of some of the Applicant's actions and the quality of his work. But the Applicant was not only denied any opportunity to comment upon it; the note was not even shown to him. The Tribunal finds that this constitutes unfair treatment and is therefore an unacceptable procedure. Adverse comments of this nature, made against a staff member by another staff member working with him should be communicated to the staff member concerned in order that he might have an opportunity to reply. The only reaction by the Respondent in this case was to reproach Mr. Vergara orally, and the Tribunal deems this insufficient to protect a staff member's rights.

VI. After reviewing the Applicant's claims concerning his alleged unfair treatment and discrimination by the Respondent, the Tribunal finds that, with the exception of the note described in para. V above, these grievances might have caused inconvenience to the Applicant, but are not such as to be construed either as a violation of his contractual rights, or as constituting unfair treatment on the Respondent's part.

VII. Further in his pleas, the Applicant complains that the Respondent did not explain to him more fully and frankly the true reasons for not renewing his contract. The Tribunal notes that despite the fact that the Applicant, as a holder of a fixed-term appointment had no expectancy of renewal of his appointment, the Respondent, nevertheless provided a full explanation of the reasons for not renewing his contract. The Tribunal finds that as early as 29 March 1983, the Applicant was aware that no funds were currently available for an extension of his post and therefore further appointment at the expiration of his contract on 30 June 1983, was not feasible. Moreover, on 3 September 1983, in a letter to the Director of TCD, the Applicant

himself stated that the Regional Programme Officer for Latin America, in meetings in London, informed him that there would not be sufficient funds in 1984 to employ three advisers. In another letter dated 10 November 1983, apprising him of the possibility that his post could be curtailed for lack of resources, the Director of TCD explained fully the unfortunate reality of the possible insufficiency of funds and referred to the strenuous efforts to obtain them to continue support for the Maritime Infrastructure Project, with the full complement of Co-ordinators/Specialists. Thus, the Applicant was aware of the compelling reason for the non-renewal of his contract, namely the insufficiency of funds.

VIII. The Applicant also complains about the abrupt way in which the decision to abandon a proposal to transfer him to the Caribbean was taken.

After reviewing the documents concerning the proposed Caribbean post, the Tribunal finds that:

1. This issue had a long history and serious efforts were made by IMO to establish the post, but a number of governments and organizations were also involved;

2. The choice of the Applicant to head the Caribbean post was a genuine choice, because of his previous stay and visits in the area, and the conviction of IMO that he could be more effective in the English-speaking countries of the sub-region;

3. The JAB was correct in believing that the complications encountered in this respect by IMO were beyond the Respondent's control and no fault could be attributed to the Respondent.

Therefore, the Tribunal is unable to accept any insinuation that the proposed transfer to the Caribbean was part of a scheme to exclude the Applicant from activity in South America.

IX. The Applicant claims that the Respondent's interpretation of the rules relating to home leave and other personnel issues is unduly rigid and formalistic. In the Tribunal's view, what is important and relevant with regard to the implementation of rules is their correct interpretation and their proper application, and not the Applicant's personal opinion about their rigidity and formalism.

X. In his last plea, the Applicant claims that the denial of the cost of a family visit by the Applicant's wife to the Applicant's duty station in 1981, was a clear violation of the Staff Rules. The Tribunal concurs with the Respondent that the appeal in this regard is time-barred, having arisen well before the submission of his appeal to the JAB.

XI. In the preceding paragraphs the Tribunal has examined the merits of the various claims of unfairness levelled by the Applicant against the Respondent and pronounced itself on each. It notes that the Applicant asserts that the Respondent was not only unfair to him, but consistently unfair. Contrary to this charge, there is documentary evidence showing recognition by the Respondent of the positive contribution made by the Applicant during various times of his employment in 1978, 1979 and at the end of his service in 1983.

XII. The Tribunal finds that these expressions of appreciation of the Applicant's work later led to tangible proof of good will towards the Applicant. After the letter of 29 March 1983, informing the Applicant of the likely discontinuance of his employment, the Applicant's contract was renewed for a six month-period up to 31 December 1983, as soon as additional funding was obtained. Moreover, when the Applicant was separated from service at the expiration of his contract on 31 December 1983, he was appointed a joint IMO/OAS (Organization of American States) regional consultant. The Applicant initially questioned any credit to IMO for the fact that he received an OAS contract after his separation from service with IMO, since the first approach to the Applicant was made by OAS. Despite the Applicant's statement, the fact remains that the involvement of IMO was necessary to appoint the Applicant jointly with OAS as an IMO/OAS regional consultant; moreover, requests for the Applicant's services had to be addressed to the Secretary-General of IMO.

XIII. For the reasons set forth above, the Tribunal finds that all the Applicant's claims, except the issue relating to critical comments made against him by Mr. Vergara and his claim for reimbursement for typing expenses, must fail.

XIV. The Tribunal decides that the Applicant should be compensated for the Administration's failure to properly handle the critical comments made against the Applicant and for typing expenses incurred by the Applicant in relation to his work. The Tribunal determines the amount of compensation to be US$1,500.

XV. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant US$1,500.

XVI. All other pleas of the Applicant are rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Ahmed OSMAN
Second Vice-President

Samar SEN
Member

Geneva, 14 May 1990

R. Maria Vicien-Milburn
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/475
15 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 475

Case No. 487: MARTORANO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Samar Sen;

Whereas, on 23 November 1988, Joseph Martorano, a staff member of the United Nations, filed an application the pleas of which read as follows:

"II. Pleas

10. I request that the Tribunal will order that as a result of the non-compliance with ST/AI/313 my personal candidacy was adversely affected and further that I be immediately promoted to the P-2 level retroactive to January 1985.

11. In addition, I would ask the Tribunal to award additional punitive damages, as it may see fit, for the gross negligence of both the JAB [Joint Appeals Board] Panel and the Administration, for the stress and mental anguish I have suffered along with the loss of career development since 1984."

Whereas the Respondent filed his answer on 3 March 1989;

Whereas the Applicant filed written observations on 4 April 1989;

Whereas, on 12 September 1989, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 19 September 1989, the Respondent provided answers thereto;

Whereas, on 3 October 1989, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 19 October 1989, the Applicant submitted further observations on the answers provided by the Respondent to the questions put by the President of the Tribunal;

Whereas, on 13 November 1989, the Tribunal put further questions to the Respondent and informed the parties that it adjourned its consideration of the case until the Tribunal's Spring session of 1990;

Whereas, on 14 February 1990, the Respondent provided answers to the questions put by the Tribunal and on 19 March 1990, the Applicant commented thereon;

Whereas, on 27 March 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, requested the Respondent to provide the Tribunal with further documents which he submitted on 29 March 1990;

Whereas the facts in the case are as follows:

Joseph Martorano entered the service of the United Nations on 22 November 1976, under a three month fixed-term appointment at the G-3, step IV level, as an Accounting Clerk. On 1 July 1977, he was promoted to the G-4 level as a Senior Accounting Clerk. On 1 November 1977, he was offered a probationary appointment and on 1 November 1978, a permanent appointment. The Applicant was detailed to the United Nations Interim Force in Lebanon for a one year period, from 5 March 1979 until 14 April 1980 and to the International Research and Training Institute for the Advancement of Women from 17 October 1983 to 21 February 1984.

On 1 November 1983, the Assistant Secretary-General for Personnel Services (OPS) announced to the staff in Administrative Instruction ST/AI/313, the "policies and procedures" governing the "Fifth Competitive Examination for Promotion to the Professional Category of Staff Members from Other Categories" scheduled for April 1984. On 26 January 1984, the Assistant Secretary-General, OPS, issued Information Circular ST/IC/83/85 in which he set forth general information "on the format and procedures" for the examination to be held in April 1984.

The Applicant, who at the time served as Senior Audit Clerk at the Internal Audit Division, was eligible for, and sat for the written portion of the examination in the Finance category. On 6 July 1984, the President of the Central Examination Board (CEB) informed Members of the Board that there was one "definite" and three "possible" professional posts available in the Finance field for promotion of successful candidates. On 10 July 1984, the Chairman of the Specialized Board of Examiners for Finance (the Specialized Board), who conducted the examinations for the specialized occupational group of Finance, informed the President of the CEB that the Board had completed marking the written portion of the examination and "understood that the exact number of candidates to be convoked for the oral examination [would] be decided by the Central Examination Board in the light of the number of posts available". The Specialized Board subsequently convoked 13 candidates for the oral portion of the examination, to be held from 10 to 12 September 1984. The Applicant was among these 13 candidates.

In a memorandum dated 1 October 1984, the Chairman of the Specialized Board informed the President of the CEB of the results of the examination. The Board recommended six out of the thirteen candidates as eligible for promotion to the Professional Category. The Chairman noted that "the list of posts in the finance field was still not available and the candidates had therefore not yet been given an opportunity to indicate their preference in accordance with the procedures laid down in ST/AI/313 ...". In view of the "highly satisfactory results" achieved that year, the Chairman of the Specialized Board urged that "every effort [be] made to obtain the necessary posts and suggest[ed] that possible alternative methods [be] explored so that all six of the successful candidates can be promoted to the Professional Category as soon as possible."

In two memoranda dated 2 October 1984 and 16 October 1984, the Assistant Secretary-General, OPS, communicated to the President of the CEB the number of professional posts available to promote successful candidates in the Fifth Competitive Examination to the Professional Category, in all occupational groups. Four posts were available in the Finance occupational group. The Applicant asserts he was informed that before the results of the

examination were known, a target of six and not four finance posts had been established. In reply to a question put by the Tribunal, the ex-officio member of the Specialized Board denied the Applicant's assertion.

On 17 October 1984, the Chief, Training and Examinations Service (TES), informed the Applicant of the four posts available in the Finance occupational group, and asked him to advise her in writing, on a special form, of his prefered choice of post. She noted that these posts had not been "available at the time of the oral examination"; that all 13 candidates convoked for the oral examination were being notified and that he would receive a separate communication concerning his "final ranking in the examination". She assured the Applicant that the anonymity of all candidates had been preserved until the list of posts was finalized, in order to "ensure that the determination of the list was in no way influenced by the knowledge of which candidates were in particular positions in the ranking". In a reply dated 22 October 1984, the Applicant asserted that the ranking of candidates had "been generally known while the official list [of posts] was still being determined". He enumerated a list of the top six successful candidates, in the order of their ranking. His name appeared as sixth on the list. The Applicant did not state his choice of post on the ground that it was "superfluous at this time ... since the ranking is generally known by most of the staff." He requested that two more posts be made available as "initially projected before ranking results became known."

On 30 October 1984, the Chief, TES, asked the Applicant to explain how he had advance knowledge of the examination results and on 12 November 1984, she informed him that the question concerning the confidentiality of the entire exercise would be pursued with the CEB and all concerned.

On 15 November 1984, the Chief, TES, informed the Applicant of the results of the examination and his ranking as number 6 out of 98 candidates.

On 3 December 1984, the Applicant wrote to the Assistant Secretary-General, OPS, and, referring to his "fruitless" exchange of correspondence with the Chief, TES, asked him to allocate two additional posts to the Finance occupational group in order to promote all six successful candidates. In a reply dated 18 December 1984, the Assistant Secretary-

General, OPS, rejected the Applicant's request and explained that "at no stage of the 1984 examination were there six posts earmarked, identified or available in the Finance occupational group."

On 25 June 1985, the Applicant asked the Secretary-General to review his case since he felt that he had "been victimized through procedural lapses and events beyond [his] control." In addition, the Applicant filed an appeal with the Panel on Discrimination and other Grievances (Panel on Discrimination).

On 13 May 1986, the Co-ordinator of the Panel on Discrimination submitted the report on the Applicant's case to the Assistant Secretary-General, OPS. The Panel recommended that the Applicant, "as one among those first six candidates [who had passed the competitive examination], be given a Professional post, even if such a post did not appear to be available as of late 1984."

On 28 May 1986, the Assistant Secretary-General, OPS, informed the Co-ordinator of the Panel on Discrimination that he was unable to accept the Panel's recommendation in the case. On 16 December 1986, the Co-ordinator of the Panel on Discrimination submitted a second report to the Assistant Secretary-General, OPS, recommending that the Applicant be placed against a P-2 vacant post in his Division and "given an SPA [Special Post Allowance] to P-2 with immediate effect pending his sitting for another G to P exam when one is given in this area."

On 22 May 1987, the Applicant requested the Secretary of the Joint Appeals Board (JAB) to review the decision by the Assistant Secretary-General, OPS, to deny him a promotion. In a reply dated 18 June 1987, the Alternate Secretary of the JAB informed the Applicant that his letter had been treated as a request for review of an administrative decision pursuant to Staff Rule 111.2(a).

On 9 July 1987, the Chief, Administrative Review Unit, informed the Applicant that unless he specified what administrative decision he was challenging, she could not initiate the review process, particularly since the documentation he attached dated back to 1984 and covered a number of issues. On 15 July 1987, the Applicant requested the Assistant Secretary-

General for the Office of Human Resources and Management (OHRM*) to review the decision not to promote him to the Professional Category after the 1984 Competitive Examination. Having received no reply, on 19 August 1987, the Applicant lodged an appeal with the JAB. The Board adopted its report on 9 June 1988. Its findings and decisions read as follows:

> "21. The Panel first had to make a determination on the preliminary questions of (a) receivability under Staff Rule 111.2(e), in view of the Respondent's contention that the appeal was time-barred and (b) the competence of the Panel under paragraph (j) of the same Staff Rule.
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> 22. The Panel recalled that under Staff Rule 111.2(e), time-limits may be waived in exceptional circumstances at the discretion of the Board. The Panel, recognizing the findings of the United Nations Administrative Tribunal in the Gaudoin case (Judgement No. 321), considered that the appellant, neither in his original statement of appeal nor in his additional submissions, had been able to produce any satisfactory evidence to account for the delay of almost three years before filing an appeal with the JAB. In particular, the Panel could not accept the appellant's argument that no time had elapsed before he began the process of appeal in view of the fact that his appeal was really a 'series of appeals' originating in September 1984 and continuing to the present date. According to the Panel, the delay in submitting the appeal which he eventually filed was the result of a choice on the part of the appellant and was not due to exceptional circumstances beyond his control. The same view was expressed by the Tribunal in the Mathur case (Judgement No. 235) where it further concluded that 'in his understandable search for an appropriate remedy for his alleged grievance the Applicant omitted to have recourse in time to the only line of action open to him under the Staff Rules and Regulations'. Consequently, the Panel found that the appellant was responsible for his failure to meet the time limits and it decided that the appeal was not receivable.
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> 23. The Panel next considered its competence under Staff Rule 111.2(j). It recalled that under paragraph (a) of the same Staff Rule the subject of an appeal must be an administrative decision as defined in Staff Regulation 11.1: 'an administrative decision alleging the non-observance of a [staff member's] terms of appointment, including all pertinent

* Successor of OPS.

regulations and rules'. Having examined the documentation before it, the Panel observed that the appeal was directed at the non-implementation of the appellant's promotion from the General Service to the Professional category, 'in spite of his examination success', due to (a) non-compliance with ST/AI/313, (b) breaches in confidentiality during the examination and (c) irregularities in the post allocation process. In the view of the Panel, none of these issues constitute administrative decisions as referred to above, but rather procedural matters falling strictly within the purview of the CEB [Central Examination Board]. For this reason, the Panel decided that it was not competent to consider the case."

At the request of the representative of the Respondent, the JAB reconvened to consider the case on the merits and reiterated its original decisions, namely "(a) that the appeal was time bound [sic] and that there was no basis for a waiver of time-limits and (b) that the subject matter of the appeal falls outside the competence of the JAB."

On 8 September 1988, the Officer-in-Charge of the Department of Administration and Management informed the Applicant that the Secretary-General had re-examined his case in light of the Board's response and taken note that the Board had reiterated its original decision not to entertain his appeal under paragraphs (e) and (j) of Staff Rule 111.2.

On 23 November 1988, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. Since the CEB had no authority to disregard administrative instructions, the decision by the Respondent not to adhere to the procedure set forth in ST/AI/313 violated the Applicant's rights under Staff Regulation 11.1 and the JAB should have considered the merits of his appeal.

2. The JAB report on the merits was misleading and misrepresented the facts.

3. The refusal of the Administration to make more than four Finance posts available was motivated by animus against the Applicant because of his activities on behalf of the Staff Union, and was facilitated by the Administration's violation of ST/AI/313 in not identifying the Finance posts before it learned the outcome of the oral examination.

Whereas the Respondent's principal contention is:

The JAB has authority to waive time-limits imposed by the Staff Rules for the receivability of appeals. However, that authority can only be exercised in exceptional cases and the JAB found that no such exceptional circumstances exist, which conclusion was within the JAB's discretion. Such decision and acceptance of it by the Secretary-General did not violate the Applicant's rights.

The Tribunal, having deliberated from 24 April to 15 May 1990, now pronounces the following judgement:

I. The Respondent has raised the possibility of the Tribunal remanding the case to the Joint Appeals Board (JAB). In view of this, the Tribunal examined at the outset how the JAB had dealt with the application before it. In its report of 9 June 1988, the JAB held that the application was not receivable inasmuch as it was time-barred and did not challenge any administrative decision. The JAB also concluded that it was not competent to deal with the application because the subject matter was essentially within the Central Examination Board's (CEB) jurisdiction. These conclusions of the JAB, if upheld, would have effectively deprived the Applicant of any opportunity to have his grievances assessed and pronounced upon by any competent authority; nor did the JAB provide any satisfactory reason for its finding that the Respondent's action in denying the Applicant's claim to promotion was not an administrative decision.

II. However, despite these findings by the JAB, the Respondent asked the JAB to examine the application on its merits, apparently accepting that the issue appealed against was, in fact, an administrative decision and that untimeliness should not be a barrier in the circumstances. The JAB seems to have responded to this request of the Respondent with a measure of reluctance but it did nevertheless consider the case further and commented on its merits. The Applicant raised no objection to the Respondent's request that the JAB again consider the case. The JAB reported to the

Respondent on 31 August 1988, recommending that no action should be taken on the appeal. It is against the Respondent's decision accepting this recommendation that the Applicant has come before the Tribunal.

III. The Tribunal finds that irrespective of the JAB's views, as expressed in its report of 9 June 1988, the fact remains that the JAB, by its subsequent examination in August 1988, fulfilled the provisions of article 9 of the Tribunal's Statute. Therefore the Tribunal does not accept the view that in this particular case sufficient grounds exist to remand it to the JAB. By following this course, the Tribunal would avoid further delay and expense.

IV. Before turning to the merits, it may be helpful to summarize the competitive examination procedure provided for under ST/AI/313, a procedure which stemmed from the decision of the General Assembly that General Service staff members should be accorded the opportunity to compete for 30% of the anticipated vacancies in P-1 and P-2 posts on the basis of ability demonstrated in competitive examinations. Periodically, such examinations are conducted under the overall direction of the CEB, and subsidiary Specialized Boards with respect to individual occupational groups such as Finance. In that field, for example, General Service staff members seeking P-1 or P-2 posts first sit for a written examination which is conducted by the Specialized Board. The latter, having received from the Office of Personnel Services (OPS) the number and identification of the posts to be made available for promotion through the competitive examination procedure, then convokes for an oral examination a group of the highest scoring candidates in the written portion of the examination. Pursuant to paragraph 15 of the Instruction cited above, the group so convoked is normally three times the number of posts available. Upon the final ranking of the candidates by the Specialized Board following the oral portion of the examination, the results, heretofore kept confidential, are transmitted to the CEB and in turn, to OPS. Both the CEB and OPS are involved in the assignment of successful candidates to the previously identified posts,

after taking into account, in order of priority, the ranking of the candidates, their stated preferences, and the relevant views of the department or office involved. The CEB makes the final recommendations to the Secretary-General with regard to assignment of sucessful candidates. A candidate who does not wish to be assigned to the post or posts available relinquishes his or her claim to promotion in connection with that examination.

V. The JAB in the first sentence of paragraph<4 of its report dated 31 August 1988, identified the primary issue on the merits: the Applicant's claim that a conspiracy existed which was aimed at preventing his promotion from the General Service to the Professional Category on the occasion of the 1984 examination. The Applicant says that originally six posts in Finance were supposed to have been provided by OPS for promotion through the competitive examination and that, under ST/AI/313, the candidates were to have been informed of each of the available posts before they were convoked for the oral part of the examination. The Respondent concedes that the candidates were not informed of the posts until after the oral examination results were known.

VI. The Applicant's charge of conspiracy is almost entirely dependent on his assertion that six Finance posts were to be considered available originally and that the number was reduced to four when it was discovered that if six posts were made available, the Applicant would be eligible for promotion to the sixth. The Applicant also claims that, in any event, at least two additional Finance posts could have been made available to accommodate his promotion, but that in a deliberate effort to prevent his promotion, neither of these two posts was made available.

VII. Since 18 December 1984, after the Applicant's claim was first asserted, the Administration has repeatedly denied the existence of any plan to make six Finance posts available for promotion through competitive examination. The Respondent has submitted substantial evidence that as of about two months before the oral examination was convoked, only four posts

in Finance were expected to be made available. Moreover, before the Specialized Board had concluded its review and discussion of the combined scores for the written and oral portions of the Finance examination on 24 September 1984, and determined how many of the candidates should be recommended as eligible for promotion, a letter dated 6 July 1984, to members of the CEB from its President shows that only four Finance posts were under consideration. An internal OPS memorandum dated 13 September 1984, shows that only two Finance posts had been identified as of that date. In addition, a memorandum dated 21 September 1984, from the then Director, Division of Personnel Administration, to the Assistant Secretary-General, OPS, and the then Under-Secretary-General for Administration and Management shows that this was still the case as of that date, though a possibility of a third post existed by then.

VIII. The Administration has firmly asserted that prior to the preparation of the list by OPS, which included the four Finance posts, and which was attached to the letter dated 2 October 1984, from the Assistant Secretary-General, OPS, to the President of the CEB, neither the Assistant Secretary-General, his staff, nor anyone other than Members of the Specialized Board knew the ranking and identity of the six candidates deemed by the Specialized Board to be eligible for promotion. The Tribunal has also been informed by the Respondent that the 2 October 1984 list of available posts was a final version of a tentative list prepared as early as 25<September 1984.

IX. The Applicant states that only after the results of the oral examination were known did OPS furnish the identification of the four posts in Finance and that this carried out the conspiracy to prevent his promotion. He claims that everyone knew by then that he ranked sixth on the list of successful candidates. But, as indicated above, there is no evidence that OPS or anyone else knew before receipt by the President of the CEB of the communication dated 1 October 1984, from the Specialized Board, who the candidates eligible for promotion to Finance posts were or what

their ranking was. On 22 October 1984, the Applicant indicated that he had learned of the 24 September 1984 conclusions reached by the Specialized Board with regard to the number and identity of those eligible for promotion, but there is no showing of when or how he learned of this, and he has not established that he or anyone else beside the Specialized Board had knowledge of it before the 2 October 1984 letter from the Assistant Secretary-General, OPS, to the CEB. OPS was in a position to have learned the final outcome of the examination before the Applicant, but unless it were established that OPS knew of it before its communication of the 2 October 1984 listing the four Finance posts, the Applicant's claim of conspiracy collapses. The evidence is consistent with the view that the number of Finance posts expected to be made available for the competitive examination process ranged between two and four before the time the ranking of the successful candidates was disclosed.

X. The Tribunal also notes that the ex-officio member of the Specialized Board, who the Applicant claims had been informed by an authoritative source in OPS that a target of six posts in Finance had been established, has denied the Applicant's assertion. The ex-officio member has explained that the President of the CEB told him prior to 10 July 1984 that, since the number of Finance posts had not been determined, he could proceed on the assumption that a maximum of six posts might be available in order to convoke candidates to the oral examination.

XI. Despite the ex-officio member's having brought to the attention of the Specialized Board the provisions of paragraph 15 of ST/AI/313 regarding the normal number of candidates convoked to the oral part of the examination, the Specialized Board decided at the 10 July 1984 meeting to convoke 13 candidates, and not 18 candidates as could have been expected if indeed six Finance posts were available. Subsequent to this meeting and before the oral examination, the CEB, according to the ex-officio member, informed the Specialized Board that OPS was having difficulty locating posts. To the best of the ex-officio member's recollection, the Specialized

Board was advised that the CEB was trying to obtain three or possibly four posts. No specific information on the number of posts was communicated by the ex-officio member "to the Applicant or to any of the candidates, during the examination process."

The foregoing and the preceding paragraphs reinforce the Tribunal's conclusion that no basis exists for the Applicant's accusation of conspiracy regarding the number of Finance posts made available by OPS with its 2 October 1984 communication.

XII. As noted above, the Administration has admitted that it did not fully comply with ST/AI/313 in not providing the list of available Finance posts to the candidates before the 10-12 September 1984 oral examination. The Tribunal deeply regrets non-compliance with important provisions of ST/AI/313, such as the one involved here. As the Tribunal's jurisprudence has repeatedly made clear, the Administration is expected to abide by its own rules, and when it fails to do so, its responsibility is engaged. In this case, however, the circumstances warrant consideration by the Tribunal whether the Administration's explanation for its failure to observe the rules was reasonable and whether the Applicant was thereby injured through alleged withholding by the Administration subsequent to 2 October 1984, of additional Finance posts that might have been made available for promotion of the Applicant.

XIII. While the Tribunal finds that the Administration's non-compliance with ST/AI/313 is open to criticism, an explanation was provided by it for its inability to provide the list of available Finance posts to the candidates before the oral examination. The Administration was having difficulty in finding the 26 posts it had promised to the Staff Union for the competitive examination. Under General Assembly Resolution 35/210 calling for approximately 30 percent of promotions to be made available through competitive examinations, the Administration would have been obliged to provide only about 16 posts. However, the Administration, in discussions with the Staff Union, had undertaken to do more than it was obliged to do

and was having difficulty in meeting that undertaking. The evidence presented by the Respondent indicates that the Administration was acting realistically and for the benefit of the staff.

XIV. The Applicant has identified two additional Finance posts which he claims could have been made available for him if OPS had wished to accede to the recommendations of the Specialized Board in its 1 October 1984 communication that all six successful candidates in the examination be promoted. Although the Administration was under no obligation to adopt this recommendation, especially given the difficulty it had in finding the greater than required number of posts for promotion through competitive examination, the Tribunal was nevertheless concerned about the possibility of discriminatory conduct, particularly because of the views expressed by the Panel on Discrimination and other Grievances (Panel on Discrimination). One of the posts had been earmarked long before the oral examination for external recruitment, and it was eventually utilized for that purpose. The delay in identifying posts for the competitive examination, therefore, was unrelated to the disposition of this particular post. The other post identified by the Applicant was not a P-1 or P-2 post but a P-3 post and, was for that reason, not available for the competitive examination. Hence, there is no evidence that the Applicant was singled out for adverse treatment with regard to either post.

XV. The Applicant also claims that he was treated unfairly, by comparison with other staff members, in that unlike them, his eligibility for promotion was not carried forward into 1985. However, the Tribunal finds that in neither of the instances cited by the Applicant (Ms. Chami or Ms. Cangelosi), was their eligibility for promotion carried forward in the sense that the Applicant contends. In both cases the staff members were promoted to posts that had been earmarked for the 1984 competitive examination, and it was mainly as a result of rejection and reoffering of posts that the actual promotions could not be implemented until 1985. The Tribunal finds no impropriety in the Administration's implementation of ST/AI/313 in this regard.

XVI. The evidence, taken as a whole, discloses that the Administration proceeded properly in filling the available vacancies by promotion. Accordingly, the Tribunal declines to award any compensation to the Applicant since it finds that he was in no way injured by the failure to comply fully with ST/AI/313. The Tribunal urges, however, that steps be taken by the Administration to ensure complete compliance with ST/AI/313 in order to avoid even a suspicion of impropriety.

XVII. In view of the Tribunal's Judgement No. 401, Upadhya (1987), in which the lack of a suitable response by the Administration to a determination by the Panel on Discrimination was considered, a word should be said about the Administration's unwillingness in this case to comply with the Panel's recommendation. Apart from mere suspicions, a principal basis for the recommendations of the Panel was its conclusion that: "Six posts could have been devoted to those who successfully passed this examination without contravening any known regulations, directives or statutes." Although this statement is doubtless correct, it essentially ignores the fact that in 1984, only four Finance posts were available. The Tribunal finds that in this case the Panel's recommendation was not based on evidence that any conspiracy actually existed and deprived the Applicant of the promotion he sought.

XVIII. In part, the Panel's suspicions were based, as it noted in paragraph 17 of its report, on the problems it encountered in tracing specific posts. While the Tribunal cannot conclude in this case that this alone gives credence to the Applicant's claim of discrimination, it shares the view, that lack of suitable and well-established procedures often makes it difficult, if not impossible, to determine what occurred with respect to specific posts. The absence of such procedures may lend itself to improper conduct and to inferences of unfair treatment when the surrounding circumstances are equivocal or inadequately explained. The Tribunal expresses the hope that the Administration will promptly take steps to establish proper procedures.

XIX. The Panel on Discrimination seemed to be impressed with evidence that, long before the episode in question, the Applicant began having controversies with the Administration because of positions he was taking as a union representative and because of other conflicts which apparently stemmed from his personality. If the Applicant was treated unfairly in connection with any of the earlier episodes referred to by the Panel, those should have been the subject of timely efforts by him for seeking redress. This was apparently not done.

XX. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Samar SEN
Member

Geneva, 15 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/476
16 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 476

Case No. 498: VALTERS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, on 1 February 1989, Erik Nikolaus Valters, a former staff member of the United Nations, filed an application, the pleas of which read as follows:

"II. Pleas

10. The Applicant respectfully requests the Administrative Tribunal to make the following findings as well as to take the following decision:

(a) To endorse the unanimous conclusion of the Joint Appeals Board that the Administration failed to protect the Applicant's reputation and that the Applicant suffered embarrassment as any reasonable person would under similar circumstances (...).

(b) To find that the Joint Appeals Board erred when it considered that it did not have competence (...) to consider the memorandum of 7 May 1987 from the Assistant Secretary-General for Human Resources Management through the Legal Counsel and the Under-Secretary-General for Administration and Management to the Secretary-General concerning the termination of the Applicant's permanent

appointment (...), a memorandum which was made available to the Applicant only in October 1988; and to find also that this memorandum (i) amounted to a further instance of defamation directed against the Applicant, and (ii) substituted a new reason for relieving the Applicant of his functions.

(c) To find that the Joint Appeals Board erred in requiring the Applicant to provide evidence to substantiate monetary loss directly resulting from the Administration's failure to protect his reputation (...).

(d) To find that the Secretary-General failed to implement in good faith the unanimous recommendation of the Joint Appeals Board, approved by him, that the Administration issue to the Applicant a personal letter of apology for its failure to protect his personal reputation (...).

(e) To find that the Secretary-General failed to implement in good faith the unanimous recommendation of the Joint Appeals Board, approved by him, that the Administration issue a formal clarification of the situation so as to correct any misconception concerning the circumstances under which the Applicant was separated from service and to acknowledge his meritorious service and good standing (...).

(f) To find that, as a result of the double failure of the Secretary-General to implement in good faith a unanimous recommendation of the Joint Appeals Board, as well as a result of the submission of the Respondent's reply to the Joint Appeals Board after a lapse of eight months (instead of within two months as required by Staff Rule 111.2(g)), the Administration inadmissibly delayed the Applicant's vindication and thereby caused further injury to him.

(g) In view of all of the above, and in view of the unprecedented and exceptional nature of the case, to decide that, for all the injuries he has suffered, the Applicant be paid the equivalent of 39 months net base salary (less the one day's salary he has already received) as well as four years education grant for his daughter, thus bringing the Applicant's total compensation, including the allowances for the agreed termination of his permanent appointment, to the 60 months net base salary, plus education grant, which he would have received had he remained in the service of the United Nations until the normal retirement age of 60."

Whereas the Respondent filed his answer on 10 April 1989;

Whereas the Applicant filed written observations on 15 June 1989;

Whereas, on 3 April 1990, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 October 1956 as a Special Intern at the Offices of the Secretary-General. Between October 1957 and December 1960, he served the Organization in the Office of Public Information on special service agreements. On 1 January 1961, he was offered a probationary appointment as an Associate Information Officer at the P-2, Step I level at the Radio and Visual Services Division of the Department of Public Information (DPI). On 1 January 1963, he was offered a permanent appointment. The Applicant continued to serve the Organization in the same Department until 1 May 1987, when he was granted special leave with full pay until 31 August 1987, the date of his separation from the service of the UN. Throughout his career with the United Nations, the Applicant was promoted to the P-3 level in 1964, to the P-4 level in 1968, to the P-5 level in 1972 and to the D-1 level in 1977. At the time of the Applicant's separation from service, he held the post of Chief of the Radio Service at the Radio and Visual Services Division, DPI.

On 16 April 1987, the recently appointed Under-Secretary-General, DPI, informed the Applicant, at a meeting in her office, that she was relieving the Applicant of his duties as Chief of the Radio Service with immediate effect. On the same date, the Applicant wrote a memorandum to the Under-Secretary-General, DPI, summarizing the contents of their discussion at the meeting. According to the Applicant, the Under-Secretary- General, DPI, had taken her decision on the ground that "there should not be two management levels between [the Under-Secretary-General] and staff members in the Radio Service". In addition, she had not offered to reassign the Applicant but "suggested that [he] should consider resigning from the Secretariat". To this end, the Applicant asserts that the Under-Secretary-General, DPI, stated she "would be willing to assist [him] in contacts with ... [the] Assistant Secretary-General for Human Resources Management [OHRM]".

On the same date, the Under-Secretary-General, DPI, informed the Directors of the Department and other staff that the Applicant had "been relieved of his duties and responsibilities as Chief of the Radio Service, effective immediately" and that the Chief, Visual Service would "take direct charge of both the Visual Service and Radio Service". Initially, the Applicant objected to the action taken by the Under-Secretary-General, DPI, and on 20 April 1987, he wrote to the Secretary-General, requesting review of the administrative decision to relieve him of his duties without offering to reassign him. In his letter, he argued that the "manner" in which the contested administrative decision had been taken and conveyed, led the staff to believe that the decision constituted a veiled disciplinary measure taken against him personally.

The Applicant and the Administration subsequently entered into negotiations to resolve the matter of the Applicant's separation from service. In a memorandum dated 29 April 1987, the Applicant confirmed to the Assistant Secretary-General, OHRM, that should the Secretary-General decide to terminate his permanent appointment as of 31 August 1987, in accordance with Staff Regulation 9.1(a), he would not contest such decision on the "understanding" he would receive "the repatriation grant, three months' salary in lieu of notice, compensation for accrued annual leave and a termination indemnity of 24 months' salary".

In a reply dated 1 May 1987, the Assistant Secretary-General, OHRM, set forth the terms of a termination agreement whereby "in view of the exceptional circumstances of [the Applicant's] case" and because he would reach age 55 in August of 1987, his separation from service would be made effective on 31 August 1987. The Applicant would be placed on special leave with full pay from 1 May 1987 until 31 August 1987 and the termination indemnity would be based on 18 and not 24 months salary as the Applicant had requested. The Applicant accepted the terms of the offer and confirmed that he was withdrawing his appeal.

In a memorandum dated 7 May 1987, the Assistant Secretary-General, OHRM, sought the Secretary-General's approval to terminate the Applicant's permanent appointment "in the interest of the good administration of the Organization under the final paragraph of Staff Regulation 9.1(a), effective

31 August 1987". He set forth the financial terms of the termination agreement and a summary of the reasons therefor. He noted in this regard, that in connection with a restructuring of DPI, "it became apparent that the continuing involvement of [the Applicant] in the DPI Radio and Visual Programmes and in the review process itself would not be conducive to the attainment of the objectives set forth by DPI top management". Consequently, the Applicant who had been "relieved from his functions without being offered a new assignment" had "appealed the decision on obvious legal and moral grounds". The Applicant asserts that he was never provided with a copy of this memorandum and that the reasons stated for his separation are different from the reasons given to him by the Under-Secretary-General, DPI, at their meeting on 16 April 1987.

In a letter dated 22 May 1987, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to terminate his permanent appointment under the final paragraph of Staff Regulation 9.1(a). He also set forth the terms of his termination indemnity and other separation payments.

In the meantime, and after the Applicant's separation from service, questions were raised at different U.N. Press briefings concerning the circumstances of the Applicant's separation from service. The Applicant contends that some of the questions put by the Press and the replies thereto by officials of DPI, concerning "his abrupt removal from his functions" gave rise "to rumours and speculation among his colleagues as well as among media correspondents reflecting negatively upon [his] professional performance and personal integrity". The Applicant claims that at those Press briefings, the United Nations Spokesperson failed to protect his reputation.

On 7 June 1987, the Applicant wrote to the Assistant Secretary-General, OHRM, to thank him for his efforts in helping to settle the matter of his termination, and to request him to ask the Under-Secretary-General, DPI, to give an explanation vindicating his "personal integrity and professional competence" at the next Press briefing to be held on 11 June 1987. The Applicant received no reply to this letter.

On 31 August 1987, the Applicant requested, under Staff Rule 111.2, administrative review of the decision by the Under-Secretary-General, DPI, not to vindicate his professional competence and personal integrity.

Having received no reply from the Secretary-General, on 5 January 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 21 November 1988. Its conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 36. The Panel concludes that the Administration failed to protect the appellant's reputation.
>
> 37. In the absence of evidence to substantiate monetary loss directly resulting therefrom, the Panel recommends that:
>
> (a) the Administration issue to the appellant a personal letter of apology for its failure to protect his personal reputation;
>
> (b) if the appellant so requests, the Administration issue a formal clarification of the situation so as to correct any misconception concerning the circumstances under which the appellant was separated from service and to acknowledge his meritorious service and good standing; and,
>
> (c) the Administration pay the appellant the equivalent of one day's net base pay (at the time of his separation from service) as a nominal payment for the moral injury suffered by the appellant as a result of the Administration's improper handling of the matter.
>
> 38. The Panel makes no further recommendations in support of the appeal."

On 7 December 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report, and had taken note of its conclusions. He stated in this regard:

> "... It is regrettable that the appropriate officials did not more clearly deal with implications raised by correspondents in regard to you, and that your good standing in the Organization was not proclaimed. In this connection, the Secretary-General wishes to assure you that your departure from the Department of Public Information in no manner reflected upon your integrity as an international civil servant or your recognized high professional competence and reputation in the field.

> The Secretary-General has, in this context, decided to accept the Board's unanimous recommendation to grant you one day's net base salary as a nominal payment for the moral injury you suffered and to take no further action on the matter."

In a letter dated 13 December 1988, the Applicant asked the Under-Secretary-General for Administration and Management for a letter of apology from him, in compliance with the recommendation of the JAB, and asked that he circulate the letter as widely as possible among journalists, staff and representatives of Member States.

On 1 February 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant suffered moral injury because of the Respondent's failure to protect his reputation.

2. The Respondent failed to implement in good faith the unanimous recommendation of the JAB, approved by the Secretary-General.

3. The Respondent failed to issue to the Applicant a personal letter of apology as recommended by the JAB.

Whereas the Respondent's principal contentions are:

1. The Respondent has no affirmative legally enforceable obligation to protect the Applicant from press innuendoes consequent on properly imposed administrative measures.

2. The Applicant apparently did not take the logical, available and effective steps to protect his own reputation in face of the innuendoes spread by correspondents.

3. The Respondent has no further legally cognizable obligations towards the Applicant. The Respondent has already sufficiently apologized to the Applicant. The Applicant's demands for dissemination are unreasonable; and the Applicant's request for monetary compensation is unjustified, excessive and beyond the Tribunal's competence.

The Tribunal, having deliberated from 25 April 1990 to 16 May 1990, now pronounces the following judgement:

I. Although the Applicant lists seven pleas, fundamentally they form part of two principal complaints. The first is that the Respondent did not extend to him the protection to which he was entitled as a staff member, and the second is that the memorandum of 7 May 1987, from the Assistant Secretary-General for Human Resources Management (OHRM), to the Secretary-General defames him and establishes that his separation was brought about by questionable means; he therefore claims monetary compensation.

II. The Joint Appeals Board (JAB) examined in detail the complaint about the lack of protection and concluded that "the Administration failed to protect the appellant's reputation" and suggested some remedial measures. The Respondent accepted the recommendations of the JAB, but the Applicant asserts that he failed to take properly the remedial measures which formed an integral part of the recommendations.

III. As for the second principal plea regarding the memorandum of 7 May 1987, the JAB did not examine it as it "did not have competence to consider [the] issues raised ... since the present appeal ... is limited to the issue of protection of personal and professional reputation only". In view of this, the question of receivability of the present plea, concerning the memorandum of 7 May 1987 might theoretically be invoked, but the Applicant side-steps the issue by suggesting that the two principal pleas are inseparable and intertwined and also as a corollary that all the other pleas arise out of these two closely connected matters. The Respondent has not raised the question of receivability in his answer.

IV. As a follow-up action for the JAB's conclusion that the Respondent had failed to protect the Applicant's reputation, the JAB recommended, and the Respondent accepted, that a "personal letter of apology" should be sent to the Applicant. However, the letter which in fact was written to the

Applicant does not, in his view, reflect what the JAB had intended and so he asserts that the acceptance of the JAB's recommendation was neither clear nor straightforward. The relevant part of the letter of 7 December 1988, from the Under-Secretary-General for Administration and Management to the Applicant reads:

> "It is regrettable that the appropriate officials did not more clearly deal with implications raised by correspondents in regard to you, and that your good standing in the Organization was not proclaimed. In this connection, the Secretary-General wishes to assure you that your departure from the Department of Public Information in no manner reflected upon your integrity as an international civil servant or your recognized high professional competence and reputation in the field."

In view of what the Applicant considers to be an evasive implementation of the JAB recommendation, he urges that since it is too late to take corrective measures to undo the harm he had suffered, he should now receive suitable monetary compensation. The Respondent is however of the view that he had acted in keeping with the spirit of the JAB recommendation for "an apology" and "has offered to make amends by disseminating a fully exculpatory statement".

V. The Applicant elaborates his arguments that the prejudice against him became abundantly clear when the Administration failed, without any stated reasons, to come to his defence when his reputation for integrity and proper personal conduct came to be questioned at a succession of press conferences - from 22 April 1987 and extending for a period of nearly five months. The Spokesperson of the U.N. was asked on numerous occasions questions reflecting on the Applicant's conduct and activities, and on each occasion an answer was evaded or the answer was supposed to be furnished by knowledgeable authorities. In fact, further statements were hardly ever made. For example, at a Staff Committee meeting on 22 July 1987, the Under-Secretary-General, DPI, was asked: "Why was Erik Valters dismissed and why was he given such a big payoff?". To this, the reply was: "No comment. It happens in corporations - in private and crown corporations".

VI. The Applicant takes particular exception to the Under-Secretary-General's reply as it did not comment on the word "dismissed" and avoided any full explanation. The Applicant's grievance was all the greater as he had written as early as 7 June 1987, i.e. several weeks earlier, in the following terms to the Assistant Secretary-General, OHRM:

> "Thank you very much for your letter dated 22 May 1987 concerning the agreed termination of my permanent appointment.
>
> I want to take this opportunity to thank you most sincerely for your personal contribution in bringing about a settlement of an awkward situation the continuation of which was neither in the best interests of the Organization nor desired by me.
>
> The only outstanding matter is, as I have mentioned to you before, some sort of vindication of my personal integrity and professional competence which have been called into question as a result of the procedure chosen, and lack of explanation offered, by the Under-Secretary-General for Public Information.
>
> In this connexion, I note that the Under-Secretary-General will meet correspondents following the noon briefing on Thursday, 11 June 1987. I respectfully suggest that this would be an appropriate opportunity for redress.
>
> With many thanks for the understanding which you have indicated to me in this matter."

VII. Thus, the Applicant claims that the Under-Secretary-General, instead of coming to his defence, did in fact increase his injury. Inasmuch as the JAB has discussed this aspect of the problem in detail, and has found that the Applicant's reputation was not adequately protected, and the Respondent has accepted that finding, the Tribunal sees no need to cover the same ground again, except to point out that in its view, the radio broadcast by the Austrian Radio about 30 April 1987 - which was not before the JAB - did not accurately reflect what happened at these press conferences and in any event, did not inflict any discernible injury to the Applicant.

VIII. There is a question whether the Applicant, under Staff Rule 101.6(e)(i), could have undertaken to clear up the innuendoes and insinuations which in

his view the U.N. Spokesperson's statements (e.g. "no comment") had created. The Tribunal accepts that these statements are susceptible to several meanings, but not necessarily the ones the Applicant might choose to give. In any event, he made no serious attempt to seek permission to defend his personal reputation by a public statement of his own. This he could have done even if the interpretation of the rights of a staff member under Staff Rule 101.6(e)(i) might not have been entirely clear to him. He did not pursue this course. His primary interest at the time appears to have been the terms of settlement for his separation. The Applicant's only statement requesting correction that the Tribunal has been able to trace, apart from unsupported oral statements, is in his letter of 7 June 1987, asking that when on 11 June, the Under-Secretary-General, DPI, met press correspondents, that "would be an appropriate opportunity for redress". This statement does not reflect, in the Tribunal's view, any great urgency in respect of the impressions created by the press conferences.

IX. Any claim now that the Applicant was put in such a situation that he could not reasonably expect permission from the Secretary-General to clear up his good name is not convincing. In the circumstances of the Applicant, vigorous action to remove any unfavourable impression left by the press conferences might not have appeared easy or feasible, but whatever might be his motives for his rather passive attitude, except for his letter of 7 June 1987, relating to an upcoming press conference, the Applicant cannot claim that the Respondent was legally obliged to do more than he actually did. The Respondent's responsibilities in these matters, as described in the Report on Standards of Conduct of the International Civil Service 1954 are not applicable since they relate to public criticism of a staff member regarding assignments carried out for the Organization. The Tribunal finds that in these circumstances there is no legal basis for any further compensation because of the statements made or not made at press conferences.

X. A detailed examination of all the arguments put forward before the Tribunal shows that the Applicant now considers that his separation from service was brought about through deception. The basis for this is that the

contents of the memorandum of 7<May 1987, from the Assistant Secretary-General, OHRM, to the Secretary-General, were not known to him. However, the Tribunal finds no substantial difference between what the Under-Secretary-General, DPI, told the Applicant on 16 April 1987, as a reason for his separation or resignation, and what the 7 May memorandum sets out.

The Applicant had no contractual right to a copy of the 7 May 1987 memorandum in question, which contained the reasons for the recommendation that the Administration agree to the type of settlement terms proposed by the Applicant. Such an internal communication need not be made available.

In any event, there is evidence that the Applicant accepted that the Administration was within its rights to make whatever changes it considered necessary to improve the efficiency of the Department of Public Information. This is clear from his letter of 20 April 1987 to the Secretary-General in which he stated inter alia that: "I fully recognize the right of the Under-Secretary-General to administer her Department in the way with which she feels most comfortable." At that stage the Applicant, according to records, neither asked nor received any further reasons for his separation. In addition, on 29 April 1987, the Applicant wrote to the Assistant Secretary-General, OHRM:

> "I should like to confirm that should the Secretary-General decide to terminate my permanent appointment, as of 31 August 1987, under the last paragraph of Staff Regulation 9.1(a), I will not contest such decision. In such case, it is my understanding that I will receive the repatriation grant, 3 months salary in lieu of notice, compensation for accrued annual leave and a termination indemnity of 24 months salary."

XI. The Applicant now states that:

> "... He would have never accepted an agreed termination of his permanent appointment had he known that the proposal would be presented to the Secretary-General on the basis of an unsubstantiated allegation of shortcomings or deficiencies; ...".

He later concludes:

> "... To this day, the Applicant is not certain of the reason for this action [to relieve him of his duties]. He only knows that, in view of his rank, he had no choice but to accept an agreed termination of his permanent appointment, ...".

However, in view of the absence of any significant difference between the 7 May 1987 memorandum and the reasons given for the Applicant's separation, the Tribunal finds no basis for any suggestion that the agreed termination is now open to attack. Moreover, the Tribunal finds no evidence to suggest that personal difficulties between the Applicant and his Under-Secretary-General are the determining factor in his separation. For example, it appears from the Applicant's personnel files that he was considering resignation as early as 24 February 1986, before the new Under-Secretary-General assumed her duties.

XII. A few peripheral issues remain to be disposed of. The Tribunal must record its disapproval at the Respondent's delay of nearly eight months in filing his answer before the JAB. However, there is nothing to show that the Applicant suffered any significant injury from this.

XIII. The Applicant complained that he was neither given the usual farewell reception nor sent a letter of appreciation at the time of his separation. This latter has been put right, and it is now too late to arrange any farewell reception - after nearly three years. The Applicant cites Judgement No. 401, Upadhya (1987) in support of some of his arguments, but the Tribunal finds that the considerations of that case - dealing with unexplained inaction by the Administration in spite of a recommendation by the Panel on Discrimination and other Grievances - do not at all apply in the present case. The Tribunal also holds that had the letter of 7 June 1987, from the Applicant to the Assistant Secretary-General, OHRM, been acted upon, some of the complications that followed could have been avoided - for this omission the Respondent is open to reproof.

XIV. Since the legal arguments advanced by the Applicant are not acceptable, the only suggestion that the Tribunal allows itself to make is that the Respondent should seriously consider whether another letter fully explaining and exculpating the Applicant could not be sent to him, even though the Tribunal regards the letter of 7 December 1988, which the Under-Secretary-General for Administration and Management wrote to the Applicant, as tantamount to an apology in terms of the JAB's recommendation. But by giving suitable circulation and publicity to a new letter - through posting in suitable bulletin boards and sending it to not more than 50 addressees that the Applicant might supply, the entire matter may be allowed to rest. This conclusion of the Tribunal, and also the fact that a copy of this judgement will form part of the Applicant's personnel file should bring some comfort to the Applicant - even if his claim to monetary damages and compensation cannot be legally entertained.

XV. Subject to the suggestions in paragraph XIV and in view of the considerations set out above, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

Geneva, 16 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary